No. 17

Brief of Humphrey & Davie, for P.

Supreme Court of the United States

Office Supreme Court U. S.
FILED
SEP 21 1899
JAMES H. MCKENNEY,
Clerk.

Filed Sept. 21, 1899.

P. L. ATHERTON, - - - *Plaintiff in Error,*

VERSUS

MARY G. ATHERTON, - *Defendant in Error.*

Brief for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

P. L. ATHERTON, - - - - *Plaintiff in Error,*

VERSUS

MARY G. ATHERTON, - - - *Defendant in Error.*

Brief for Plaintiff in Error.

STATEMENT.

This is a writ of error to the Supreme Court of the State of New York. It runs to a judgment entered in that court under a remittitur from the Court of Appeals. For convenience we will call the plaintiff in error, Mr. Atherton, and the defendant in error, Mrs. Atherton. They were at one time husband and wife. The question in this case is as to whether they still continue to occupy that relation to each other, or whether Mr. Atherton is now a single man and Mrs. Atherton a single woman.

Mr. Atherton claims that the relation heretofore existing was dissolved by a valid judgment of divorce *a vinculo*, rendered by a court of the State of Kentucky. This judgment being pleaded in New York was held to be void. The federal question is whether the courts of New York have given to the judgment of the Kentucky court the faith and credit to which, under the Constitution and laws of the United States, it was entitled.

Peter Lee Atherton has, from his birth, been a citizen of Kentucky and never had any other citizenship, residence or domicile. (R. 221.) He was married to Mary Goodenow Kelsey in Oneida County, New York, on October 17, 1888. (R. 221.) After the marriage Mr. and Mrs. Atherton went to Louisville,

Kentucky, where they took up their home with the parents of Mr. Atherton. (R. 221.) They continued to reside there until in October, 1891, Mrs. Atherton left her husband's house. Since that time there has been a continuous separation. (R. 221.)

On January 8, 1890, a daughter was born, whose name is Mary V. Atherton. (R. 221.)

On leaving her husband's house, Mrs. Atherton took with her the child. After an interval of a day or two, which she spent at the house of a neighbor, Mrs. Atherton went with her child to the Galt House, in Louisville, Kentucky. There she was joined by Mr. C. D. Adams, a leading lawyer from Utica, New York; her cousin, Mr. Henry P. Goodenow, who is a lawyer, living in Minnesota; her aunt, Miss Goodenow; Mr. and Mrs. Evans, her brother-in-law and sister; and she also had the benefit of the counsel of a Louisville lawyer, Mr. E. J. McDermott. (R. 131.)

Mrs. Atherton's three legal representatives met the counsel for Mr. Atherton at the office of the latter. The counsel for Mr. Atherton invited Mrs. Atherton, through her counsel, to return with the child to his home, without any conditions being made upon such invitation. This was declined. It was then agreed between the counsel that pending negotiations the child should not be removed beyond the jurisdiction of the courts of the State of Kentucky. After negotiations continuing during three or four days, a result was reached in the form of an agreement, which is as follows (R. 142, 174, 217, 221, 228):

Agreement.

"The undersigned, Peter Lee Atherton, and his wife, Mary G. Atherton, having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequence which may follow, or right which may arise to either party if such status shall continue, desire to provide for the best interest of their child, Mary Valeria Atherton. With this view they have entered into the following agreement:

"Peter Lee Atherton contracting with Henry P. Goodenow as trustee for Mary G. Atherton, and said trustee contracting with Peter Lee Atherton on behalf and jointly with Mary G. Atherton.

"1. The child is hereby committed for its nurture, education, and control to the joint custody and guardianship of her mother, Mary G. Atherton, and her paternal grandmother, Maria B. Atherton, on the following basis:

"The domicile of the child is to be the State of Kentucky. The mother is to have the child until January 1, 1892. During the years 1892, 1893, and 1894 the grandmother is to have the child and control its abode, travel, and custody from January 1 to the first week in May; and the mother from the first week in May to December 31st. After that period, during the existence of this arrangement, the grandmother's custody, control, etc., is to exist during the first four and last two months of the year; that of the mother during the other months of the year.

"2. During that part of each year in which the child is under the control of the mother, Peter Lee Atherton is to pay into the hands of Mary G. Atherton $500 in installments of equal amounts at the beginning of each of the months of said control, for the comfortable maintenance of the child. The expense of conveying the child with a proper attendant, in the journey to the mother, Mary G. Atherton, is to be borne by the father, Peter Lee Atherton, and the like expense on the journey back to the grandmother is to come out of the sum provided for the child's support.

"3. Peter Lee Atherton is to pay into the hands of Mary G. Atherton for her support $125 at the beginning of each month until this agreement does by its own terms end. This is to be taken in lieu of alimony and dowable and distributable share in his estate.

"4. The following provisions are made for the termination of this agreement and for the contingency of various events that may happen in the future; among others, divorce and second marriage of Peter Lee Atherton or Mary G. Atherton:

"*a*. This agreement as to the child is to terminate on her arrival at fourteen years of age, it being recognized that she will then be old enough to choose for herself. It shall, of course, in like manner, terminate at her death.

"*b*. This agreement as to the support of Mary G. Atherton is to end at her death, or upon her again marrying, and in any event, on the 8th day of January, 1904.

"*c.* If Mary G. Atherton shall marry again or die, the person then being joint guardian with her of the child shall become its sole guardian. If Maria B. Atherton shall die while she is joint guardian, Peter Lee Atherton, if alive, or if he be dead, his father, John M. Atherton, shall choose a successor in the joint guardianship; and if Mary G. Atherton objects to the person so nominated, the senior (in years) judge of the Jefferson Circuit Court shall decide the question of fitness and confirm or reject such nomination.

"*d.* A successor to said successor may under similar circumstances be in like manner chosen.

"*e.* If, during the existence of this agreement, Mary G. Atherton, being the joint guardian, John M. Atherton and Maria B. Atherton shall die, and Peter Lee Atherton die or be or become married, the sole guardianship shall rest in said Mary G. Atherton.

"*f.* If, during the lives of Peter Lee Atherton and Mary G. Atherton, a sole guardianship shall have resulted under the terms of this agreement, each parent shall have reasonable access to and right of visitation from the child, notwithstanding such parent may have again married.

"*g.* If a divorce shall be granted, this agreement, so far as it concerns provision for Mary G. Atherton, shall be carried into the decree as in full satisfaction of all claim for alimony, and so far as concerns provision for and custody of the child, reserving to the court the usual power to provide against events and contingencies not covered by this agreement.

"Witness the signature of all the parties this October 10, 1891.

"HENRY P. GOODENOW.
"MARY G. ATHERTON.
"PETER LEE ATHERTON.

"In the presence of:

"EDWARD J. DERMOTT.
"C. D. ADAMS."

There was paid by Mr. Atherton to the representatives of Mrs. Atherton $250, and in a few days thereafter she left the State of Kentucky, taking the child with her. (R. 159, 172.)

Mrs. Atherton delivered the child to the paternal grandmother in Cincinnati in the first week of January, 1892. The paternal grandmother re-delivered the child to Mrs. Atherton in

Buffalo in 1892. Mr. Atherton caused to be paid into the hands of Mrs. Atherton regularly, month by month, the amounts agreed upon for the support of the child in her custody, and also for her own support, up to and including a payment made in November, 1892. (R. 159, 172.)

In November, 1892, Mrs. Atherton caused notice to be given to Mr. Atherton that she would no longer abide by the provisions of the agreement, and particularly that she would not respect the same in regard to her duty to deliver the child to its paternal grandmother on January 1, 1893. (R. 172.)

Mrs. Atherton has ever since that time retained possession of the child, and has kept it out of the State of Kentucky.

December 28, 1892, Mr. Atherton began an action for divorce against Mrs. Atherton in the Louisville Law and Equity Court, upon the ground that she had abandoned him in October, 1891, without his fault, and had continued such abandonment for more than one year then last past. This is a ground for divorce *a vinculo* under the laws of the State of Kentucky. Showing was made in the case that Mrs. Atherton had been absent from Kentucky for four months. Thereupon the clerk of the Louisville Law and Equity Court entered an order warning Mrs. Atherton to appear and answer the petition within sixty days of December 28, 1892, and appointed John C. Walker, a regular practicing attorney in the court, to inform Mrs. Atherton of the institution of the action. (R. 150.)

This attorney on January 5, 1893, wrote a letter containing a full statement of the nature and purposes of the suit, and enclosed a substantial copy of the petition to Mrs. Atherton. This he placed in the post-office, addressed to her at Clinton, New York, duly stamped, and with request on the back of the envelope for it to be returned to him from the post-office if not received by her. The letter was never returned to him. (R. 151.) Mr. Atherton's allegations in his answer to the New York suit, as hereinafter mentioned, that the letter was received by her, and that she knew of the pendency of the divorce suit

from the time it was filed, or soon after that, and of its nature and purposes, and voluntarily failed to defend the same—are all undenied. (R. 213, 214, 219.)

This action regularly proceeded in the Kentucky court, and on March 14, 1893, judgment was entered dissolving the bonds of matrimony, upon the ground that Mrs. Atherton had abandoned Mr. Atherton without fault of Mr. Atherton while both were residing in Jefferson County, in the State of Kentucky, in October, 1891, and that the abandonment had continued without interruption from October, 1891, to the date of the entering of the judgment; and upon the filing of the petition in the cause, the abandonment had existed for more than one year.

The following is the judgment of the Kentucky court in full:

> "And afterwards, at a court held for the court aforesaid, on the 14th day of March, 1893:
>
> "This action having come on to be heard upon the pleadings, report of attorney for the absent defendant and the evidence, and the court being advised, it is considered by the court that the plaintiff, Peter Lee Atherton, has resided in Jefferson County, Ky., continuously for ten years last past, and that he and the defendant, Mary G. Atherton, were married on the 17th day of October, 1888; that from the date of said marriage the said plaintiff and defendant resided in Jefferson County, Kentucky; that while the plaintiff and defendant were thus residing in Jefferson County, Kentucky, to wit, in the month of October, 1891, the defendant, Mary G. Atherton, without fault upon the part of the plaintiff, abandoned him, and that said abandonment has continued without interruption from that time to this, and at the filing of the petition herein had existed for more than one year; that the defendant, Mary G. Atherton, had, at the filing of the petition herein, been absent from this state for more than four months; that therefore it is further considered and adjudged by the court that the plaintiff, Peter Lee Atherton, is entitled to the decree of divorce prayed for in this petition, and that the bonds of matrimony between the said plaintiff, Peter Lee Atherton, and the said defendant, Mary G. Atherton, be and they are hereby dissolved.
>
> "It appearing to the court that in the said marriage there was born a daughter, Mary Valeria Atherton, on January

8, 1890, and that the defendant, Mary G. Atherton, now has the said child beyond the jurisdiction of this court, without the consent of the plaintiff; and that the court can not make an effective order in reference to the custody of said child, no order will now be made as to such custody, or as to any allowance of alimony, or in the nature thereof to the said defendant; but the court reserves the power to make such orders hereafter.

"It is further considered by the court that each party shall restore to the other any property, not disposed of at the commencement of this action, which he or she may have obtained directly or indirectly from or through the other during marriage, in consideration or by reason thereof.

"The sum of twenty dollars is allowed John C. Walker, warning order attorney, and the plaintiff shall pay this and all the other costs of the action to this date incurred." (R. 152.)

The Kentucky law of divorce and procedure is fully set out in the Record. (R. 209-213.)

It was agreed that in lieu of evidence either party might refer to the statutes and decisions of Kentucky. (R. 144.)

For convenience, so much of Mr. Atherton's answer in the New York cause as sets out the law of Kentucky is printed in the Appendix.

The proceeding to bring Mrs. Atherton before the court is such as was and is authorized by the law of the State of Kentucky in cases of non-resident defendants as well as in cases of defendants resident in Kentucky who have been absent four months.

After Mr. Atherton had thus brought his suit in Kentucky, Mrs. Atherton, on January 13, 1893, filed a suit in the Supreme Court of Oneida County, New York, and had process served on Mr. Atherton in Kentucky, according to the New York statutes, by sending a copy of the complaint through the mail addressed to him at his home in Louisville, Ky. (R. 178, 179, 180.)

In this complaint she alleged that at the time of her marriage she was a resident of the State of New York, and Mr. Ather-

ton a resident of Louisville; that after the marriage they both resided in Louisville, the home of the father and mother of the defendant, and continued to reside there until she left Mr. Atherton in October, 1891 (R. 181); that in October, 1891, she ceased to live with Mr. Atherton as his wife and came to Clinton, in the State of New York, bringing with her the child, and that she and the child had since resided at Clinton, and since October, 1891, she had been and at the time of the commencement of the action was a resident of the State of New York, and the child was there in her custody; that Mr. Atherton had continued to reside and then resided at Louisville, Kentucky, and was a resident of the State of Kentucky.

She charged Mr. Atherton with being a man of violent and ungovernable temper, and alleged that by reason of abuse and threats she was greatly frightened and feared that if she returned to him he would do her injury and would separate her from the child. There are both general and specific allegations of fact claimed to be cruel and inhuman treatment. She demanded judgment for separation from bed and board; the custody of the child, and that Mr. Atherton be compelled to provide suitably for her and for the maintenance and education of the child.

To this complaint Mr. Atherton filed his answer, which put in issue the allegations in the complaint of violence and cruelty. (R. 191.) It set up substantially the facts we have heretofore stated in regard to the marriage, the residence, the separation of the parties, the entering into the agreement, and Mrs. Atherton's violation of it. It pleaded the institution by Mr. Atherton of the suit in Kentucky for divorce and the proceedings therein, and the final judgment. It claimed that Mrs. Atherton, up to the entering of the judgment, had her domicile and legal residence in the State of Kentucky, and that the courts of that State had full and complete jurisdiction of the subject-matter and parties, and power to render the judgment, and that by its force the bond of matrimony had been absolutely dissolved between the parties.

By the answer Mr. Atherton claimed and demanded that full force and effect be given to the judgment as provided for in the Constitution of the United States and the Act of Congress in pursuance thereof. (R. 215.) He asked that the complaint be dismissed, and that he be awarded the custody of the child. A full copy of the Kentucky record was presented. (R. 144, 150, 177.)

To this answer Mrs. Atherton filed a reply in which she admitted her signature to the agreement, but denied none of the allegations as to its breach. (R. 219.) She attempted to avoid these by alleging that she was unfit to make the agreement mentioned or any agreement, because she had become exhausted, nervous, weak, and sick in body; that when the arrangement was proposed to her she objected to the same and refused and declined to sign it until it was stated and represented to her that the agreement was not and would not be permanent, and that it was intended to be and would be a mere experimental and temporary arrangement, not binding upon her if she became dissatisfied with it; that it was for a year only, and would be binding upon her only for a year. She alleged that understanding, and, believing that the agreement would not be permanent and was intended to be a mere experimental and temporary arrangement, she signed it. She further alleged that at the time it was signed it was not intended or understood by any of the parties that the same was or would be permanent, but was intended and understood as temporary and as binding at most for a year only. She claims that it was void as to her.

For a further reply to the answer of Mr. Atherton, she said:

> "That as to the allegations in the said answer of the statutes and laws of the State of Kentucky, and of the commencement of and proceedings in the alleged action in the State of Kentucky, and of the alleged judgment recovered therein as claimed and alleged in said answer, this plaintiff denies any knowledge or information of such allegations or of any of them sufficient to form a belief; and therefore denies the same."

She further alleged that no process in the action was ever served upon her, and if the action was commenced, and if the judgment was recovered therein, the same was not binding upon her, and was not a bar to her suit.

On the issues thus framed, a trial was had before the Supreme Court, Special Term, Hon. P. B. McLennan presiding. His finding of facts is at R. 221, 225, 228, 233; the judgment, R. 225; his opinion, R. 235. It is sufficient for the present purpose to say that the court found that Mr. Atherton's conduct to Mrs. Atherton was such that, in the judgment of the court, she was justified in leaving him; that she did leave him and rightfully come to the State of New York, and there became domiciled, acquiring in this way a domicile separate from that of Mr. Atherton; and that such was her domicile when Mr. Atherton filed his suit in December, 1892.

The judgment declared that Mrs. Atherton should be forever separated from Mr. Atherton, and from his bed and board, and that Mrs. Atherton should have the care, custody, and education of the child; that Mr. Atherton should pay to Mrs. Atherton $125 per month from the date of the judgment, January 6, 1894, as alimony, and for her separate support, and that he should pay to Mrs. Atherton the sum of $100 per month, on the same date, for the care, maintenance, and education of the child of the marriage; the first payment, viz., that to Mrs. Atherton for herself, to be during her natural life; that on account of the child, until she should attain the age of twenty-one years.

Mr. Atherton was given the right to see the child, and to visit her at all reasonable times at Clinton, Oneida County, New York, or any other place where she might be residing with her mother.

On appeal this judgment, with an immaterial exception, was affirmed by the Supreme Court, General Term (R. 245), the opinion of the court being at R. 247.

On further appeal to the Court of Appeals, it was adjudged that the judgment of the Supreme Court be in all things affirmed, and that the record be remitted to be proceeded upon according to law. (R. 255.)

The opinion of the New York Court of Appeals has not been copied into the record, but we have printed it as an appendix to this brief. It is reported *sub nom.* Atherton v. Atherton, 155 N. Y. 129.

The judgment of the Court of Appeals was made the judgment of the Supreme Court, Special Term. (R. 256, 257.) The errors assigned by Mr. Atherton are as follows:

Errors Assigned.

1. That said judgment is against the right of the said petitioner.

2. That the said judgment fails to give that faith and credit to the decree of the court in Kentucky to which, under the Constitution and laws of the United States, it is entitled.

3. That due respect and effect being given to the said judgment of the Kentucky court under the Constitution and laws of the United States, the said petitioner was, at the time that he filed his answer in said case brought against him by the said Mary G. Atherton in the Supreme Court of the State of New York, not the husband of the said Mary G. Atherton, but the bonds of matrimony between the said Mary G. Atherton and himself had been sundered.

4. That the judgment of which your petitioner complains is erroneous and violative of the rights of your petitioner under the Constitution and laws of the United States.

ARGUMENT.

We deem it important that the court should apprehend at the outset the exact question to be decided.

Statement of Facts Not Disputed.

The undisputed facts are that Mrs. Atherton, before her marriage, was domiciled in New York; Mr. Atherton, in Kentucky. They were married in New York with the view and intention, immediately executed, of coming to Kentucky to live. Kentucky, therefore, became Mrs. Atherton's domicile, not alone because it was her husband's domicile, but also because she selected it as her domicile. Kentucky was the domicile of Mr. and Mrs. Atherton during the whole time that they lived together as man and wife. Mr. and Mrs. Atherton separated in Kentucky. Mrs. Atherton came away from Kentucky to New York, Mr. Atherton remaining in Kentucky. This was in October, 1891. A year, thereafter, viz., in December, 1892, Mr. Atherton brought his suit for divorce in a court of the State and county where Mr. and Mrs. Atherton had had their domicile during the whole time that they lived together as man and wife. The ground of divorce alleged was one which, by law, was a ground for divorce when the parties were married and when they came to live in Kentucky. The process used for bringing Mrs. Atherton before the court was such process as was in force at the time Mr. and Mrs. Atherton separated, and at the time Mrs. Atherton left Kentucky.

In order that Mr. Atherton might obtain a divorce he was compelled to allege and prove that Mrs. Atherton had abandoned him, and that such abandonment was without fault on his part, and that it had existed, at the time his petition was filed, for more than a year.

The proceedings in which Mr. Atherton obtained his judgment for divorce in Kentucky were entirely regular according to the law of that State. This was found by Judge McLennan. (R. 228.) He concisely summed up these findings in his opinion, from which we make this extract:

> "The Jefferson Circuit Court of the State of Kentucky had jurisdiction of the subject-matter of the action, and evidence was produced which, under the statutes of that

State, the court considered entitled the plaintiff in that action to the relief prayed for in his petition. All the forms of law were strictly complied with, and a judicial determination was made, after considering the evidence and circumstances presented, dissolving the marital relations existing between the parties to that action. The court decided that this plaintiff (Mrs. Atherton) had abandoned the defendant (Mr. Atherton) without fault on his part, and that being a ground for absolute divorce, under the laws of the State of Kentucky, rendered judgment accordingly. Was that judgment so rendered binding and conclusive upon the plaintiff (Mrs. Atherton) in this action? If it was, she can not succeed here." (R. 236.)

Reason of New York Courts for Holding Kentucky Judgment Void.

The ground upon which the courts of New York have denied to this judgment validity, and upon which they have pronounced it of no force and effect, is this: They hold that an action for divorce is an action *in personam*, and that a defendant not served with process within the jurisdiction can, where such judgment is relied on in any State other than that in which it was rendered, disregard its findings. They do not deny that substituted service will be valid and sustain a judgment *in personam*, provided the defendant be at the time such substituted service is employed domiciled in the State where the suit is brought.

If, however, the defendant is elsewhere domiciled, process must be served personally within the territorial limits of the State where the action is pending.

In case of a suit by husband against a wife, these courts hold that it is competent for the wife to show that she was not personally served within the territorial jurisdiction, and had, prior to any substituted service, acquired a new domicile; and to this end is to prove, first, the actual acquisition of such new domicile; second, her right to acquire a new domicile. And this last can be shown by evidence, that by reason of the conduct of the husband, the wife was justified in separating herself from him;

and this proof of fault in the husband may be made, and the judgment avoided, although the fact that the husband is without fault was necessary to be alleged, and proved, and was alleged, and proved in the proceeding, and was expressly found, in the judgment of divorce, as a part of the final order in the divorce proceedings.

There is here no case of the husband leaving the matrimonial domicile and elsewhere procuring a divorce. There is here no case of the husband attempting to procure a divorce at the matrimonial domicile for a cause which occurred outside of that domicile. There is here no case of the husband alleging any ground of divorce which was not such at the time the wife separated from him, and went beyond the matrimonial domicile, nor of his using any proceedings in the way of substituted service different from those in existence at that time.

The questions of the effect of judgments for divorce under the law of nations or as between the States in the Union, under the Constitution and laws of the United States, are so important and so various and of such great consequence that we have considered it expedient, in the very outset, to inform the Court of the exact limits within which its present judgment is to be bounded.

Logic of the Opinion of the Court of Appeals of New York in this Case.

Concisely stated, we submit that the Court of Appeals of New York has decided in this case the following propositions:

A husband and wife, domiciled in another State of the Union, separate. One of them goes to New York and acquires a domicile. The other can not thereafter bring a suit for divorce at the matrimonial domicile unless by some means the one who has left the State can be induced to return to it and there be served with process, or persuaded to enter an appearance to the action.

This right of exemption from suit at the matrimonial domicile arises from the acquisition of the new domicile. If the wife

is the one who abandons the matrimonial domicile, in order to show that she has acquired the new domicile she must prove that her leaving her husband was through his fault; but she can prove this even though the contrary has been adjudged in an action at the matrimonial domicile.

If, however, it is the husband that has abandoned the wife, it matters not who was in fault, because a man has the right at his will to change his domicile.

As the ultimate fact which defeats the jurisdiction of the matrimonial domicile is the acquisition of a new domicile, the husband need give no reason for the change.

In New York, before a suit for divorce can be brought, the complainant must be a resident of the State. In the case supposed, therefore, of either husband or wife leaving the other and coming to New York, and there acquiring a domicile, the only remedy for the other spouse is to acquire a residence in New York, and in this way procure such relief as its laws will afford. Whatever offense may have been committed, immunity from suit at the matrimonial domicile is complete. The law of New York must determine the liability, and in that forum must relief be sought. And if it should become like that of South Carolina, there could be no relief at all.

What Faith and Credit is a Judgment of One State Entitled to in Another?

Article 4, Section 1, of the Constitution of the United States is as follows:

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

In Huntington v. Attrill, Mr. Justice Gray, delivering the opinion of this court, after quoting the constitutional provisions above given, said:

"This clause of the Constitution, like the less perfect provision on the subject in the Articles of Confederation, as observed by Mr. Justice Story, 'was intended to give the same conclusive effect to judgments of all the States, so as to promote uniformity, as well as certainty, in the rule among them; and had three distinct objects; first, to declare, and by its own force establish, that full faith and credit should be given to the judgments of every other State; second, to authorize Congress to prescribe the manner of authenticating them; and third, to authorize Congress to prescribe their effect when so authenticated. Story on the Constitution, Sections 1307, 1308.' Congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any State may be authenticated, has defined the effect thereof, by enacting that 'the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.' Rev. Stat., Section 905, re-enacting Act of May 26, 1790, c. 11, 1 Stat. 122." (146 U. S. 684-685.)

It is obvious that this is a rule higher than international comity.

It appears, however, that even upon the ground of international comity, the courts of the United States will be governed by the rule of reciprocity, and will give full faith and credit to the judgment of a foreign State, where such foreign State gives full faith and credit to our judgments; and will deny full faith and credit to such foreign judgments only where the foreign State denies full faith and credit to our judgments. (Hilton v. Guyot, 159 U. S. 113; Richie v. McMullen, 159 U. S. 235.)

The effect, to be given in one State to the judgment of a court of another State, is the same as the effect, given by the courts of the State where such judgment was rendered, to that judgment. (Renaud v. Abbott, 116 U. S. 277; Hanley v. Donoghue, 116 U. S. 1.) It is there said (page 3):

"By the settled construction of these provisions of the Constitution and Statutes of the United States a judgment of a State court in a cause within its jurisdiction and against a

defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to such force and effect against the person summoned or the property attached when the question is presented for decision in a court of another State as it is in the State in which it was rendered."

And again it is said:

"Judgments recovered in one of the States of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits nor impeachable for fraud in obtaining them if rendered by a court having jurisdiction of the cause and of the parties." (Page 4.)

The Jurisdiction of the Court Can be Inquired Into.

The jurisdiction of the court can be inquired into. So where a judgment was rendered in New York against two partners, one of whom resided in New York and one in Louisiana, the latter not served, it was held that, notwithstanding a New York statute to the contrary, the judgment against the partner not served and not residing in New York was void. (D'Arcy v. Ketchum, 11 How. 175.)

Thompson v. Whitman, 18 Wall. 464, and Knowles v. Gas Light Co., 19 Wall. 61, follow this case, and there are many others to the same effect, the last case cited holding that it is competent to contradict the return of an officer upon the summons reciting its execution.

As stated above, jurisdiction being present, the judgment can not be avoided by showing that it was obtained by fraud. (Christmas v. Russell, 5 Wall. 290.) Other authorities can of course be cited to the same proposition.

What Process is Necessary.

Process, however, need not be personally served in order that a court may acquire jurisdiction to render a personal judgment. Thus in Knowles v. Gas Light Co., 19 Wall. 61, this court said:

> "We do not mean to say that personal service is, in all cases, necessary to enable a court to acquire jurisdiction of the person. Where the defendant resides in the State in which the proceedings are had, service at his residence and perhaps other modes of constructive service may be authorized by the laws of the State; but in the case of non-residents like that under consideration, personal service can not be dispensed with unless the defendant voluntarily appears."

In Grover & Baker Machine Co. v. Radcliffe, 137 U. S. 297, this court quoted with approval a Maryland case in which it was said:

> "A law which substitutes constructive for actual notice is binding upon persons domiciled within the State where such law prevails, and as respects the property of others there situated, but can bind neither person nor property beyond its limits."

Further this court said:

> "Publicist concur that domicile generally determines the particular territorial jurisprudence to which every individual is subject. As correctly said by Mr. Wharton, the nationality of our citizens is that of the nation, and, by the laws of the United States, they are bound in all matters in which the United States are sovereign; but in other matters their domicile is in the particular State, and that determines the applicatory territorial jurisprudence. A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant, this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the State entering judgment; and it is competent for a defendant in an action on a judgment in a sister State, as in an action on a foreign judgment, to set up as a defense want of jurisdiction in that he was not an inhabitant of the State rendering the judgment, and had not been served with process and did not enter his appearance."

In Bersenthal v. Williams, 1 Duval (Kentucky), 331, it was held that suit could be maintained in Kentucky upon a personal judgment rendered in Ohio upon constructive service, the defendant in the judgment being, at the time it was rendered, domiciled in Ohio.

This subject is discussed and there is a good deal of curious learning upon it in the case of Beard v. Beard, 21 Ind. 321. It is there said:

> "In Scotland there seems to have been a practice in early times of summoning debtors to pay debts by blowing a horn; out of which practice arose warrants of horning and judgments of horning were rendered."

It further shows that in an action in England, on one of these "judgments of horning," it was held that they were not repugnant to the principles of universal justice, but were perfectly consistent with the principles of justice. Of course, however, these were judgments obtained against resident citizens of Scotland who were either concealed or temporarily absent.

In the New York case of Hunt v. Hunt, 72 N. Y. 217, it appears that the husband and wife were residents of New Orleans. The wife left the home of her husband and came to New York, the husband continuing to reside in New Orleans. He there obtained a divorce with constructive service of process. The court examined the question as to whether the wife had good ground for leaving the husband, and finding that she had not, held that the judgment for divorce was valid. We do not cite the case for that point now, but to call attention to what the court said in reference to service of process. We make the following quotation:

> "Where the defendant was a citizen of this State when the marriage was contracted, and is still domiciled here, it is not to be doubted that, as a general rule, such service in such suit is good and sufficient to confer jurisdiction of the person. (This is said in reference to the provision in the New York Code for service of summons upon absent defendant by publication.) It is part of the law of the State of which the defendant is a subject and citizen. That law binding upon him is an assent given by him, that there may and will be acquired jurisdiction over him to hear the case and render judgment affecting, to an extent, his personal rights. As a denizen and citizen of the State he owes it

allegiance, and is under the force and authority of its laws, and as long as he remains in that relation he can not throw off his subjection by the act of temporary or prolonged absence from the State. He is still amenable to its laws, and bound by their provisions as to substituted service of process; and where the case is that of a citizen of another State having his domicile there and judgment against him there on a substituted service such as the law of his allegiance has authorized in the case of an absent defendant, he is bound by it though actually abiding in this State; and when it has been duly made, he is subject in person to the State court duly awarding it." (Hunt v. Hunt, 72 N. Y. 217.)

Constitution and Statute Apply to Judgments in Divorce Cases.

It will hardly be disputed that the rule of international comity or the provision of the Constitution and laws of the United States in reference to the effect of a judgment in one State pleaded in another applies to divorce cases.

In Barber v. Barber, 21 How. 583, a bill was filed by a divorced wife against her husband in the District Court of the United States for the District of Wisconsin, to enforce a decree for alimony. The court, among other things, said:

> "The parties to a cause for a divorce and for alimony are as much bound by a decree for both which has been given by one of our State courts having jurisdiction of the subject-matter and over the parties as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as such by other courts; and such a judgment or decree rendered in any State of the United States, the court having jurisdiction, will be carried into judgment in any other State, to have there the same binding force that it has in the State in which it was originally given. For such a purpose both the equity courts of the United States and the same courts of the State have jurisdiction."

In Cheever v. Wilson, 9 Wall. 123, husband and wife were domiciled in Washington City. The wife went to Indiana and

filed a petition for divorce. The husband answered. The question of the validity of this divorce coming up in certain proceedings, the court held that the decree was valid and effectual according to the law and adjudications in Indiana, and then said:

> "The Constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. If a judgment is conclusive in a State where it is rendered, it is equally conclusive everywhere in the courts of the United States."

So in Laing v. Rigney, 160 U. S. 532, there was a decree of divorce and alimony by the Court of Chancery of New Jersey, which was sued on in New York. The New York courts refusing to give the decree for alimony any effect, a writ of error was taken to this court and the judgment reversed distinctly upon the ground that due effect had not been given to the provisions of Article IV of the Constitution of the United States requiring full faith and credit to be given in each State to the judicial proceedings of every other State.

Jurisdiction May Be In Personam or In Rem.

There are two classes of cases where jurisdiction can be asserted: first, where the judgment which is sought is merely a personal one, as in a suit on a promissory note; second, where there is jurisdiction of some thing or actions ordinarily called *in rem.*

If the action is one *in personam* and the court has jurisdiction of the subject-matter and parties, either by personal service or entry of appearance, where the defendant is resident or nonresident of the State where the suit is brought, or by constructive service where the defendant is a resident of the State and either conceals himself or is temporarily absent, and the statutes of the State authorize a personal judgment upon such constructive process—in each of these cases the personal judgment is

entitled, when relied upon in any other State, to the same credit to which it is entitled in the State where the judgment was rendered.

Where the action is one *in rem* and the court has jurisdiction of the *res*, either by its seizure, as in cases of attachment against property, or process of garnishment of credits of the defendant, or for the foreclosure of a mortgage or other lien where the property is within the territorial jurisdiction of a court—in all these cases a judgment, rendered after such constructive process by publication or otherwise, as the Legislature of the State where the suit is brought may prescribe, is equally binding in any other State, where its effect may be called in question.

In other words, jurisdiction of the *res* being present, a judgment of a State court affecting the *res* is as much entitled to full faith and credit as a judgment where the court acquires jurisdiction of the person, and renders a personal judgment.

This is clearly apparent from the whole course of the opinion in the leading case of Pennoyer v. Neff, 95 U. S. 714, where the subject is fully treated.

What Faith and Credit Has This Judgment in Kentucky?

The question as to what faith and credit Kentucky gives to this judgment or one similar to this, is easily answered.

The Court of Appeals of Kentucky has held that where a husband left that State, abandoning his wife, his wife remaining could proceed against him as a non-resident by warning order and the appointment of a representing attorney, and procure a divorce from him. The court said:

> "It would be a reproach to our legislation if a faithless husband in Kentucky could, by leaving the State, deprive his abandoned wife of the power of obtaining a divorce at home." (Rhyms v. Rhyms, 7 Bush, 316.)

In Hawkins v. Ragsdale, it appeared that one A. S. Hawkins and the appellant were husband and wife, residing in Ken-

tucky, where the husband owned certain lands; that the wife abandoned her husband, that he subsequently removed to the State of Indiana, and there obtained a divorce from the bonds of matrimony by proceeding on constructive service, in compliance with the laws of that State. The husband afterward married in the State of Indiana and died. This was an action by his divorced wife to recover dower in the lands lying in Kentucky and owned by the husband at the time of the separation and divorce.

The court held that A. S. Hawkins, being a *bona fide* citizen of Indiana and resident therein at the time of the proceedings in which the divorce was obtained, the decree severing the bonds of matrimony determined the status of the parties, but did not, by its own force, affect the right to the property in Kentucky; but that by the statute law of Kentucky a divorce barred all claims to curtesy and dower, and that this statute was intended to apply to all valid divorces, no matter by what sovereignty granted; that, therefore, the divorced wife was by the judgment of the Indiana court deprived of all dower in the Kentucky lands. (Hawkins v. Ragsdale, 80 Ky. 353; 44 Am. Rep. 483.)

In Perzel v. Perzel, 91 Ky. 634, a wife sued her husband for divorce *a vinculo*. The parties were married in the State of New York and lived together as husband and wife for five years, when the husband left New York for France. It appeared that prior to the time of the desertion the wife, after her marriage, lived a portion of the time in Covington, Kentucky, with her mother. She was an actress by profession, and during the winter months was engaged on the stage. She seemed to have upon her the support of two children by a former husband, and also the support of her present husband. It appeared that the defendant had no particular domicile. The court held that the wife having a residence in Kentucky was entitled to a divorce, of course by constructive process, as the husband did not appear in the case.

It will not be denied, we believe, that in Kentucky the judgment we plead suffices to entirely destroy the bond of matrimony

which heretofore existed between the parties to this cause. If, therefore, the same faith and credit had been given to this judgment in New York that it is entitled to in Kentucky, it is obvious that Mrs. Atherton's suit must have been dismissed.

Even if an Action for Divorce is in Personam, the Kentucky Judgment is Binding.

We must always keep in mind the precise question at issue in this cause; we mean between the judgment of the State of Kentucky upon the one side, and the right of the courts of the State of New York upon the other to disregard that judgment. It is indisputable—indeed, it is found as a fact, that Kentucky was the matrimonial domicile. By that we mean the domicile in contemplation of which the marriage was contracted, and where the husband and wife lived until they separated. The suit was brought by the husband at the matrimonial domicile against the wife who had left that domicile. The husband's ground for divorce was that his wife had abandoned him without his fault. This question the Kentucky court was bound to decide—a question pertinent to the merits of the cause; vital to the judgment. Evidence was introduced in the Kentucky tribunal amply sufficient to sustain its finding. The wife, although having knowledge of the pendency of the proceeding, declined to introduce any evidence; but when the judgment is offered, the courts of New York say it is void because evidence has been introduced in the New York forum to show that the wife rightfully left the husband; and therefore rightfully acquired the New York domicile.

The New York courts do not pretend to say that the Kentucky judgment can be disregarded simply because the wife has come into New York and has lived there. They admit that it is necessary to go further than this and to show that she did this because her husband was in fault. So far from giving full faith and credit to the Kentucky judgment, therefore, absolutely no

credit is given to it at all. Its most vital adjudication is disregarded. The Kentucky court had either the right or it had not the right to decide the question as to whether Mrs. Atherton's abandonment of her husband was without his fault. If it had not the right to decide that question, then there is no question which it did have the right to decide. The Kentucky court is a superior court of general jurisdiction, given the power to determine actions for divorce and to decree them *a vinculo*; and it must have the power to decide whether or not there is cause which will justify such a decree. It is not contended, as we have said, that the evidence was insufficient, but that if the defendant had chosen to put in her evidence the court would have found the other way.

We submit that the adjudication by the Kentucky court, that the abandonment of the husband by the wife was without the husband's fault, must be held to determine this question conclusively. And so are the authorities.

There are, we believe, two cases exactly in point:

In Cheeley v. Clayton, 110 U. S. 701, the divorce was held void because the husband, who had sued in Colorado his absent wife, did not pursue the law of constructive process.

The controversy arose after Clayton's death between two Mrs. Claytons, each claiming to administer on his estate.

It seems that Clayton filed his bill for divorce in Colorado. He there alleged that his wife had been taken by him to Illinois, and had refused to return to Colorado. But the court in which the judgment for divorce was pleaded found as a fact "that the wife was, on the day the suit for divorce was filed and thereafter until the present time, a citizen and resident of the State of Illinois." This court said:

> "Nor do we give any weight to the finding of the court below that the wife at the time of the proceedings for divorce was a citizen and resident of the State of Illinois; for it is hard to show how, if she unjustifiably refused to live with her husband in Colorado, she could lawfully acquire in his lifetime a separate domicile in another State,

or how, if the territorial court had jurisdiction to render the decree of divorce and did render it upon the grounds of her unlawful absence from him, the finding of the court below could consist with the fact so adjudged in the decree of divorce."

It seems to us that language could not be more applicable to the present situation than is this language.

In Hood v. Hood, 11 Allen, 196, the wife sued the husband for divorce in Massachusetts. The husband answered, setting up a divorce which he had obtained from the wife in Illinois. The wife claimed that she had never had any notice of the pendency of the proceedings in Illinois, and that the divorce was obtained there by fraud; that the parties had been married in Massachusetts; had removed to Illinois, and had afterwards separated in Massachusetts by consent. The court held the Illinois judgment valid. Among other things, the court said:

"But this libelant now alleges that the decree for divorce in Illinois was procured by fraud, and the evidence reported has some tendency to show that the separation was by his consent, and so was not the desertion upon which his libel was founded; but the fact of desertion was conclusively settled between these parties by the judgment in Illinois, and it is not now competent for the libelant, the wife, to offer evidence to contradict that judgment."

This case, like the Clayton case, was one where the husband was suing at the matrimonial domicile, and the only service upon the wife was constructive service.

Both these cases, therefore, decide expressly that the finding of the court which rendered the judgment for the divorce that the wife abandoned her husband, can not be contradicted when the judgment is offered in evidence.

If this be so, then as Kentucky was Mrs. Atherton's domicile, she was bound by the substituted service exactly as if she had been served personally in Kentucky.

We suppose that it can not be doubted that wherever a marriage may be contracted, if the husband and wife become there-

after domiciled within a particular State, the law of that domicile controls the dissolution of the marriage. The case here is stronger, because the marriage was made in view of the Kentucky domicile. From Warrender v. Warrender, 2 C. & F. 508, we quote the following out of the argument of counsel:

> "Huber thus lays down the law: '*Non ita precise respiciendus est locus in quo contractus initus est, &c. Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit. Proinde et locus matrimonii contracti non tam is est ubi contractus nuptialis initus est quam in quo contrahentes matrimonium exercere voluerunt.*'"

And again at page 515:

> "'*Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit,*' are the words of Julian in the Pandects."

IF A SUIT FOR DIVORCE IS IN REM THE KENTUCKY JUDGMENT IS CONCLUSIVE.

The Nature of a Suit for Divorce.

What, according to the decisions of this Court, is the nature of a suit for divorce? Is such a suit an action *in personam* or an action *in rem*? The courts of New York seem to consider the marriage tie as a civil contract, not capable of dissolution in any other method than will suffice to dissolve any other personal civil contract. We will hereafter discuss more at length the decisions of this State, but for the present it is sufficient to make the statement as above.

The Supreme Court of the United States is everywhere quoted as holding that marriage is not simply a civil contract, but is a relation and a status, and that the rules under which and the process by which it may be dissolved are quite distinct from those affecting other contracts.

Thus Chief Justice Marshall, in delivering his judgment in the Dartmouth College case, said:

"The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value and confer the rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorce." (4 Wheaton, 629.)

In Cheever v. Wilson, 9 Wall. 123, the facts of which we have given above, the court said:

"It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and change of domicile. That she did reside in the county where the petition was filed is expressly found by the decree. Whether this finding is conclusive or only *prima facie* sufficient is a point on which the authorities are not in harmony. We do not deem it necessary to express any opinion upon the point. The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record. Giving to what there is the fullest effect, it only raises a suspicion that the *animus manendi* may have been wanting. It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's, and that she can not have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. The proceedings for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offense, and of the domicile of the husband are of no consequence."

If an action for divorce is an action *in personam*, it is obvious that all of this reasoning is merely vain, as domicile has absolutely nothing to do with jurisdiction in personal actions; and surely the court can not have meant that the wife could maintain a suit for divorce without regard to the domicile of her husband only when she can find him personally present in the territory of her own domicile; nor the converse, that the husband can only sue the wife in his domicile when he can find her personally present within that domicile.

In Pennoyer v. Neff, 95 U. S. 734, this court used the following language:

> "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which by the law of the State a dissolution may be granted may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. Bishop on Marriage and Divorce, Section 156."

In Cheeley v. Clayton, 110 U. S. 701–705, Mr. Justice Gray, delivering the opinion of this Court, said:

> "The courts of the State of the domicile of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws for any cause allowed by those laws, without regard to the place of the marriage or to that of the commission of the offense for which the divorce is granted; and a divorce so obtained is valid everywhere. (Story, Conflict of Laws, Sec. 230a; Cheever v. Wilson, 9 Wall. 108; Harvey v. Farnie, 8 App. Cas. 43.) If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile; and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicile, after reasonable notice to her, either by personal service or by publication in accordance

with its laws, is valid, although she never in fact resided in that State. (Burlen v. Shannon, 115 Mass. 438; Hunt v. Hunt, 72 N. Y. 218.) But in order to make the divorce valid, either in the State in which it was granted or in another State, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first State requires."

Again, in Hilton v. Guyot, 159 U. S. 113–167, the same learned judge delivering the opinion of this court, said:

> "A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. Coddington's Case, 2 Swanson, 326; Roach v. Garvan, 1 Ves. Sen. 157; Harvey v. Farnie, 8 App. Cas. 43; Cheeley v. Clayton, 110 U. S. 701.
>
> "It was of a foreign sentence of divorce that Lord Chancellor Nottingham, in the House of Lords, in 1688, in Coddington's Case above cited, said: 'It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the form of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom if they should serve us so abroad, and give no credit to our sentences.'"

In Maynard v. Hill, 125 U. S. 191, there is a full discussion of the question whether the legislature of the Territory of Oregon had the right, by the passage of a law, to dissolve the relation between a husband and wife; and it was held that such an act of the legislature was valid. The case was that of a husband and wife who were married in Vermont and then went to the State of Ohio to live. The husband left the wife and their child in Ohio and went to the Territory of Oregon, saying when he left that he would either return or would send for his family, and in the mean time contribute to their support. He violated all of these promises, and, without any communication whatever with his wife, and without ever having contributed to her support

from the time he left her, obtained from the legislature of Oregon a law dissolving the bonds of matrimony. This law was held by this court to be entirely within the legislative competence.

With due respect, we submit that it would be impossible to sustain this decision and yet to say that it was not competent for the legislature to give to its courts the power to in like manner dissolve the matrimonial relation existing between one of its domiciled citizens and an absent party.

It is not contended that in any of these cases which we have cited from this court the facts are the same as in the case at bar. Thus in Cheever v. Wilson, 9 Wall. 123, the husband entered his appearance to the wife's suit by filing an answer. In Pennoyer v. Neff, 95 U. S. 714, the case before the court was as to the title to certain real estate levied on under a personal judgment for money rendered on constructive service. In Cheeley v. Clayton, 110 U. S. 701, the judgment for divorce was held void because the statutes of Colorado providing for constructive service had not been followed, and under the decisions of the State of Colorado a judgment rendered upon such defective constructive service was held to be void. In Maynard v. Hill, 125 U. S. 201, the divorce was by legislative act. In Hilton v. Guyot, 159 U. S. 167, the question was as to the validity of a personal judgment rendered in France.

But we insist that these authorities are controlling in a larger sense. They have laid down principles and announced doctrines which can bear no other construction than that which has been given to them by a multitude of State decisions; and that is that the relation of husband and wife is a status which is within the control of the State wherein either party to the relation is domiciled, and capable of being dissolved either by direct legislative action or by judicial proceeding that is effective, even though the notice be not given by the service of process within the territorial jurisdiction of the sovereignty.

In considering the question as to the validity of a judgment where dependent upon personal service, the distinction is not

between actual and substituted service, but between service within the territorial jurisdiction of the court and notice given without the territorial jurisdiction of the court; whether this notice be by delivering a copy of the proceedings personally to the respondent outside such territorial jurisdiction or notifying the respondent by letter addressed to the place of his residence, or by publication in newspaper or otherwise at the place where the suit is brought.

In considering, as a matter of international comity, the validity of a decree even *in rem*, or a decree in reference to a status, it may be that the courts would regard the question whether the substituted service was a fair one—one which was reasonably designed to give the respondent an opportunity to know of the pendency of the proceedings, so that, if he or she desired, defense might be interposed.

In Pennoyer v. Neff, 95 U. S. 727, this court said:

> "Process from the tribunals of one State can not run into another State and summon parties there domiciled to leave its territory and respond to the proceedings against them. Publication of process or notice within the State where the tribunal sits can not create any greater obligation upon the non-resident to appear. Process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability."

It is quite clear that, outside the territorial jurisdiction of the court, service by newspaper, by letter-carrier, or by a sheriff are all equally good if they conform to the statute prescribing the method of constructive service, and if the method is one free of fraud. 2 Bishop on M. & D., Sections 554, 140, 144; Trubner v. Trubner, L. R. 15 P. D. 24.

It can not be claimed that the method used in Kentucky for informing an absent or non-resident defendant of proceedings taken against him is unfair or even ineffectual for the purposes of communicating knowledge to such defendant. The Code of Civil Procedure requires that an affidavit shall be filed stating

either that the defendant has been absent from the State four months or is a non-resident, and giving the post-office address of such defendant. Thereupon the clerk enters an order warning the defendant to appear and answer at a fixed time—generally sixty days thereafter. At the same time an attorney of record is appointed whose duty it is to communicate to the defendant thus warned, and whose duty it also is to defend the suit if he can not hear from the defendant. In divorce proceedings the allegations of the petition are taken as traversed and must be proved, just as if each of them had been specifically denied.

The steps to be taken for this sort of constructive service are exactly the same in the case of a defendant who is absent four months and one who is a non-resident.

In the case at bar the petition showed that Mrs. Atherton had been absent from Kentucky for more than four months. The clerk, in entering the warning order, spoke of her as a "non-resident" defendant; but this was a mere clerical misprision. The right name to call her would be the "absent defendant," or, indeed, the "defendant," as no qualifying phrase is called for under our law.

An attorney was appointed; he did write to Mrs. Atherton at her correct address, and put upon his letter the usual request to the post-office authorities to return it if not called for. It was never returned. In the answer of Mr. Atherton in the New York case he expressly alleged the fact that she received this letter and had notice of the pendency of this proceeding. She did not deny this in her reply, nor did she endeavor to deny it upon the witness stand, nor was there any finding of the court in any way to the effect that she was not notified of the pendency of the case.

So that there is here no objection to these proceedings on account of any want of fairness or any want of opportunity to the defendant to come in and traverse the allegations at the matrimonial domicile and to have determined the very right of the matter at the place where above all others it should have been determined.

Opinions of Text-Writers on This Subject.

The treatise of Mr. Bishop on Marriage and Divorce has certainly taken the highest rank, and has been cited in this court and we believe all of the courts of last resort in this country and has received high commendation in England (Brett, L. J., in Niboyet v. Niboyet, Law Reports, 4 Probate Div. 14.)

An examination of Mr. Bishop's book will show that a careful study and analysis of the adjudged cases and of the principles of international comity and interstate obligation leads him to the following conclusions:

First, that the place where the marriage is contracted or where the parties were domiciled at the time it was contracted, or where the offense was committed by either party against the marital obligation, are all immaterial.

Second, that where a divorce is declared by a court in which neither of the parties is domiciled, the judgment is void although both parties may appear. This, of course, is entirely at war with any notion that an action for divorce is a personal action in any of its aspects.

Third, that the wife has the right to acquire a domicile separate from her husband, and, having acquired such domicile, whether with or without any fault upon his part, can maintain an action for divorce at such domicile.

Fourth, that a husband, wherever domiciled, can maintain an action for divorce against his wife wherever she may be domiciled.

Fifth, that a divorce granted upon constructive service of process is as valid as one granted upon actual service of process.

Sixth, that a divorce granted to either husband or wife *a vinculo* is valid wherever presented, and the person so divorced is a single man or woman, as the case may be, in all civilized States.

It is obvious that the case at bar does not call for the decision of many of these questions. Here there has been but one matrimonial domicile; here the offense was committed at the matrimonial domicile, and the suit is here by the

husband at the matrimonial domicile against the wife who has left that domicile.

As a concise statement of the proposition involved, we give the following extract from 2 Bishop on M. & D., Sec. 152, where it is said:

> "Rejecting some judicial dicta not amounting to decision, more or less adverse, and not taking into the account such cases as the early North Carolina one now overruled, the present clear American doctrine, made conclusive by decisions of the court of ultimate resort, accepts *ex parte* divorces pronounced by the court of the applicant's domicile in full compliance with the local law, after its constructive notice to the absent defendant, as adequate everywhere to dissolve or otherwise ascertain the marriage status."

In 1 Greenleaf on Evidence, Sec. 525, the author is discussing the conclusiveness of judgments and the rule that the judgment, in order to be binding, must be one to which both litigants were parties. He says:

> "An apparent exception to this rule as to the identity of the parties is allowed in the cases usually termed proceedings *in rem*, which include not only judgments of condemnation of property as forfeited or as prize in the Exchequer or Admiralty, but also the decisions of other courts directly upon the personal status or relations of the parties, such as marriage, divorce, bastardy, . . . and the like. These decisions are binding and conclusive not only upon the parties actually litigating in the cause but upon all others . . . partly upon the more general ground of public policy and convenience, it being essential to the peace of society that questions of this kind should not be left doubtful, but that the domestic and social relations of every member of the community should be clearly defined and conclusively settled and at rest."

In 2 Freeman on Judgments, 585, it is said:

> "The conclusions which are sustained by a decided majority of the cases are very clearly and correctly stated by Mr. Cooley in his work on Constitutional Limitations, in the following language: 'We conceive the true rule to be

that the actual *bona fide* residence of either husband or wife within a State will give to that State authority to determine the status of such party, and to pass upon any question affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage or of any alleged offense, and that any such court in that State as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that State or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party.'"

In Black on Judgments it is said:

"In the first place, a proceeding in divorce is a proceeding *in rem*. It is not an action by the petitioner against the defendant, at least not primarily. It is a proceeding by the petitioner to obtain an adjudication upon his or her marital status, which is the *res;* and the person who has the nearest interest in that status, and whose acts are alleged to have given rise to a cause for its dissolution, is named and cited as defendant. In the next place, it is an admitted principle of international law that every State has the sole and paramount right to legislate and adjudicate upon the status of its own domiciled citizens, and to regulate and determine their domestic relations. These two principles will furnish the key to the whole subject. For, accepting them as true, it at once becomes apparent that the jurisdiction in divorce must depend solely upon the domicile of the parties—upon the power to adjudicate upon their status —and not upon any question of service of process.

"If both the married parties are *bona fide* domiciled citizens of a given State, there can be no question of the power of the courts of that State to divorce them. It is immaterial that the marriage was celebrated in another State, and that the laws of such other State do not recognize the cause alleged as sufficient ground for granting a divorce. Wherever the parties go they carry their status with them, and it becomes subject to the jurisdiction of any State in which they acquire an actual domicile. And the causes for

altering or dissolving that status must be determined by the laws of the State which has present jurisdiction over it, not by the laws of the State where it originated. Further, in this case, it is immaterial where the offense was committed which is alleged as ground for divorce. If both parties were domiciled in one State, and the offense charged was perpetrated there, and both afterwards remove to another State and acquire a domicile there, the latter State has jurisdiction to dissolve the marriage on the ground of such offense. Here again it is the law of the State having control of the status which must govern, not the *lex loci delicti*.

"It now remains for us to consider the case in which the petitioner is a domiciled citizen of the State where the proceedings in divorce are taken, and the defendant is domiciled elsewhere. And on the admitted principle that each State has the right to determine the status and the domestic relations of its own citizens, the conclusion appears irresistible that the *bona fide* presence of the *res*—the status of a domiciled citizen—should give its courts jurisdiction. If this were not so, neither of the two States in which the parties are respectively resident, nor both together, could exercise this unquestioned right. But the question, though easily soluble on purely logical grounds, may also be treated as one settled by authority. And the decided weight of authority is in favor of the rule here contended for. In this connection it must be observed that the usual rule, that the domicile of the wife follows that of the husband, does not apply in these cases. For the purpose of petitioning in divorce, she may have a separate domicile. The law will recognize her as having a separate existence, and separate rights and interests, in all cases where the very object of the proceeding is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicile and home.

"If it be conceded that a divorce proceeding is a proceeding *in rem*, it will necessarily follow that actual and personal notice to the defendant is not indispensable. The vital requisite is the jurisdiction of the *res*. And power and authority over the *res*, as we have shown, depends upon the actual and *bona fide* domicile of the petitioner within the State. This being secured, it is immaterial that the other party is only constructively notified of the institution of the proceedings. The citation should be the best that the circumstances permit, and such as will tend to prevent fraud.

But it is by no means necessary that it should be the same as is required to justify a judgment *in personam*. This rule is sustained by a great preponderance of authority, as will appear in the next section.

"Although the foregoing arguments have generally been accounted complete and irrefragable, yet some of the courts, while conceding one or more of the separate points, have refused to accept the conclusion to which the whole line of reasoning logically and inevitably leads. Thus the books exhibit a few decisions, and some dicta, to the effect that a decree of divorce against a non-resident, founded upon a merely constructive service of process, as by publication, is void and of no effect. But some of these cases have been overruled; others have been tacitly repudiated, and the true and fundamental principles governing the question have become more and more clear to the courts and have gained weight with the increasing body of decisions. So that now the rule may be regarded as settled, by the great preponderance of authority, that a decree of divorce pronounced by a competent court, in favor of a *bona fide* domiciled citizen of the State and against a non-resident, where service of process was made by a reasonable constructive notice, and in the absence of any fraud or collusion, is valid and binding both in that State and in all other States." 2 Black on Judgments, Sections 925, 926, 928, 931, and 932.

The English Cases.

There are two cases in the English books which seem to us, in their last analysis, to bear out most fully the doctrine that the jurisdiction to decree a divorce is not a personal one. These are Lolley's case, 2 Rus. & R. C. C. 237, and Shaw v. Gould, L. R. 3 H. L. 55. In each of these cases two English people were married in England. Afterwards they went to Scotland, and during a temporary residence there a divorce was decreed by the Scotch courts. In both cases it clearly appeared that neither the husband nor the wife was domiciled in Scotland at the time of the divorce. In both cases it was held that the divorce was void in England. If marriage is a status, controlled by the sovereignty of the domicile of one or both of the parties

to it, and not controllable by a sovereignty in which neither of the parties is domiciled, then these cases stand on a sure foundation; but if marriage is a civil contract, subject to dissolution by a suit *in personam*, we find it difficult to assign any good reason why the judgment of the Scotch court was not valid in Scotland, and also valid everywhere else in the civilized world.

We do not mean to say that the fact that the parties were neither of them domiciled in Scotland is given by the judges in Lolley's case as the reason for their decision. The fact is that that case has been so much commented upon and the expressions used by the judges in it so much explained that it is difficult now to say exactly what was decided except that Lolley was a bigamist.

In Warrender v. Warrender, 2 Cl. & F. 488, there is a most ample discussion of the question in the House of Lords. In that case it appeared that a domiciled Scotchman married an English woman in England; that the domicile of the parties continued to be Scotch; that they separated in England, under an agreement by which the husband was to maintain the wife.

The husband continued to reside in Scotland. The wife resided abroad—in France, Switzerland, and Italy. The husband brought suit in Scotland against the wife for absolute divorce, alleging a fault in the wife committed in France. The wife was personally served in France. The House of Lords held that the divorce *a vinculo* was valid.

While under what we might call the threat of Lord Lyndhurst that he would call in the judges if this decision was to be considered as impugning that in Lolley's case, Lord Brougham asserted that it did not break in on Lolley's case, and was a decision in reference to the law of Scotland; yet we think it can not be doubted that the case has controlled subsequent decisions in England to such an extent that no case since has attempted to support what was at one time believed to be the doctrine of Lolley's case, that only an English parliament could dissolve an English marriage.

The case of McCarthy v. DeCaix, 2 Cl. & F. 568, has been so thoroughly discredited that no further comment upon it is necessary. Indeed, one can hardly fail to see that Lord Brougham's judgment in this case was influenced more by his anger at the decision in Lolley's case than by any sound reasoning upon his own part.

A case often referred to is Maghee v. M'Allister, 3 Irish Ch. Rep. 604. There Lord Chancellor Blackburn had the case before him of a domiciled Scotchman marrying an Irish woman in England. The husband and wife returned to Scotland, and the wife thus became a domiciled Scotch woman. As we read the case, the parties separated in England, and Mrs. M'Allister did not come back to Scotland. Mr. M'Allister, in Scotland, procured a divorce from her *a vinculo* for desertion and non-adherence. Mrs. M'Allister afterwards married again, and dying both husbands claimed a share of her estate in certain partition proceedings in Ireland. The court held the decree of divorce valid, and that the second marriage, which was solemnized in Scotland, was valid. It does not appear distinctly, in the report, whether the wife was present in Scotland at the time of the divorce, though we infer she was not.

In Harvey v. Farnie, Law Rep., 8 App. Cases, 43, it appeared that one Farnie, domiciled in Scotland, married an English woman in England. The husband and wife returned to Scotland, where the wife obtained a decree of divorce *a vinculo*. Subsequently Farnie came to England and married again, his first wife being alive. The second wife presented a petition praying for a declaration that her marriage was null and void, because the first wife was still alive. All the courts in turn, beginning with the Probate and Divorce Division, then the Court of Appeal, and then the House of Lords, held that the divorce was valid and the second marriage valid. Lord Selborne, Lord Chancellor, among other things, said:

> "Now, I must take the liberty of saying that if this question is to be tested upon principle apart from authority, although it can not be denied that the varying jurisprudence,

and perhaps legislation also, of different countries may and do introduce some undesirable cases of conflict between the laws of those different countries on questions of matrimonial status, yet I should certainly say that in such circumstances as those which exist in the present case the principles of private international law point in the direction of the validity of such a sentence and of its recognition by the courts of other countries. Of course I assume that in the way of that recognition there would not be interposed any positive legislation bearing upon the point, or any positive prohibition of its own law binding upon the court in which the question arises. Upon this point of principle, how does the matter stand? Let it be granted (and I think it is well settled) that the general rule, internationally recognized, as to the constitution of marriage is, that when there is no personal incapacity attaching upon either party, or upon the particular party who is to be regarded, by the law to which he is personally subject, that is the law of his own country, then marriage is held to be constituted everywhere, if it is well constituted, *secundum legem loci contractus*. But that merely determines what in all these cases is the point you start from. When a marriage has been duly solemnized according to the law of the place of solemnization, the parties become husband and wife. But when they become husband and wife, what is the character which the wife assumes? She becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicil than his, which she acquires. The marriage is contracted with a view to that matrimonial domicil which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad. Therefore it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law, subject to it in respect of the consequences of the matrimonial relation and all other consequences depending upon the law of the husband's domicil. That would appear to be so upon principle; and that principle followed out would certainly apply in a case like this, where the domicil into which she has married has never undergone a change, where there has been no divergence or cohabitation or residence, and where the crime was committed in the country both of the domicil and of the forum. It would appear, therefore, that if this question is

to depend on any principle at all, it must be upon the principle of recognizing the law of the forum and matrimonial domicil, when, as in this case, they both concur."

It is to be observed that the House of Lords treated the case throughout as involving the question whether the Scotch courts had jurisdiction of the status by reason of Scotland being the matrimonial domicile and not at all as turning upon any question of personal service within the territorial jurisdiction of the Scotch courts.

A very recent and very thoroughly considered case on this subject is that of Le Mesurier v. Le Mesurier, Law Rep. App. Cases (1895), 517, being a decision of the Privy Council on appeal from the Supreme Court of Ceylon.

In that case the husband brought an action against the wife for divorce in Ceylon. The husband was an Englishman by birth, and married in England a French woman. The parties had always lived in Ceylon, the husband being a member of the Ceylon Civil Service. He had retained, however, his English domicile of origin. Lord Watson, in an opinion which reviews the Scotch and English cases, held that there was no jurisdiction in the Ceylon court. He concludes his judgment in the following language:

"Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in Wilson v. Wilson, which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce: 'It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce.

> It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.'"

It would seem to us to be too clear for dispute that this language, applied to the case at bar, points to Kentucky as the forum to conclusively determine the matrimonial status of the parties to this cause.

Decisions of State Courts.

There are so many cases in the State courts that we will not attempt to make any thing like a complete statement of them. A few will suffice to show the trend of authority. It will appear that this establishes a doctrine much beyond that which is necessary to a reversal of this judgment.

In Thompson v. State, 28 Ala. 13, it appeared that Allen Thompson was indicted for marrying a second time, having a wife then living. The accused was first married in the State of Alabama; then went to Mississippi, and then to Arkansas, leaving his wife and children. The wife returned to her father's house in Alabama. The husband obtained a divorce in Arkansas upon constructive service of process, and then married a second time. The court held that this judgment of divorce was valid, and dissolved the relations between the husband and wife so that they were no longer such. The court, among other things, said:

> "From the principle thus laid down in these two cases it results that jurisdiction over the question of divorce must be allowed to the courts of domicile, and if the husband has the right to emigrate and acquire a new domicile—which, in this country, no one will deny—as a consequence he must acquire the right of having his matrimonial status controlled by the laws and judicial tribunals of the country of the new

domicile. If the divorce can not be sought in the acquired domicile of the husband, it could only be sought in the tribunals of the country where the wife might happen to be. Wheresoever the wife might wander the husband would be compelled to follow, no matter how flagrant her violations of conjugal duty had been. The obtainment of the divorce would then depend upon the laws of the country where the suit might be brought, and it would thus be in the wife's power to select the country to be sued in."

Again the court said:

"The general doctrine is not intended to be denied in this opinion that decrees and judgments, when attempted to be set up in a different State from that in which they were rendered may not be credited where the court had no jurisdiction of the defendant's person and there was no appearance; but in our judgment that rule does not apply to the decrees for a divorce. The jurisdiction over questions of divorce must be maintained where the party seeking the divorce is domiciled in the country and the proceedings are consistent with the laws of the State in which the party has his domicile. The right of a court, when authorized by the statute of the State, to proceed against the non-resident defendant by publication results necessarily from the existence of the jurisdiction. If it can not proceed on notice of that kind it can not proceed at all, for no other notice can be given, and a denial of the power thus to proceed would be fatal to the jurisdiction."

In James Estate, 99 Cal. 374, there was a contest over administration between two contending widows. Husband and wife had lived in New York and there separated. The husband went to Missouri, and there obtained a divorce by publication, of which his wife had no knowledge. The court held that it was valid everywhere:

"While there is some conflict in the decisions on this point, we entertain no doubt that a decree of divorce which has been regularly obtained in one State by a citizen thereof against a non-resident defendant constructively served with process in the action, and without other notice, and which is valid and effectual in the State in which such decree is rendered, is equally valid in a sister State."

In the case of Dunham v. Dunham, 162 Ill. 589, after suit for divorce had been begun by the husband in Illinois, the wife sued and obtained a divorce in North Dakota, and pleaded it. Held, that proof showed the wife was not a resident of North Dakota, and the judgment was fraudulent. The court recognizes fully the law that if the wife had gone to North Dakota *bona fide* as a resident and obtained a divorce, it would have been binding everywhere. The court said:

> "Marriage, as understood among civilized people, is the union of one man with one woman, and, if valid where celebrated, is valid everywhere; and it would seem to follow from the 'full faith and credit' clause of the Constitution of the United States, and it ought to follow as a matter of logic, and from the comity of States, that where that union is lawfully dissolved in one jurisdiction, where one of the parties is in good faith domiciled, and in honest compliance with its laws, it should be treated as dissolved everywhere (1 Nels. Div. and Sep. 65), though it must not be forgotten that the law favors marriage, and does not favor divorce. It is no sufficient answer to say that a husband or wife in fault may wrongfully leave the other, and, after acquiring a domicile in another jurisdiction, sue for and obtain a divorce without the knowledge of the innocent party. The most sacred relations of life are, from their very nature, capable of the greatest abuses. . . . Besides, it would seem to be a necessary incident to the marriage relation that whenever the parties to it have become separated, and reside in different jurisdictions, the status of marriage of each to the other follows each, and inheres in the jurisdiction in which he or she is domiciled; and, while a bill will not lie for a divorce in favor of a non-resident, or to change his status from a married to a single man, yet when the status of marriage is destroyed in one jurisdiction as to the one there residing, it is necessarily destroyed in the other, for, as well said by Mr. Bishop, 'matrimony can only exist in pairs.' This author, in maintaining that the marriage status may be changed by the jurisdiction where only one of the parties resides, among other things, says: 'The law knows only two forms of status as to matrimony—married, single. A man who has a wife, or a woman who has a husband, is married. One without a husband or wife is not married—is single. And it is immaterial to this proposition whether or

> not either or both were once married, or whether the dissolution of a former marriage was by death or divorce. Taking one party out of the marriage, by whatever means, leaves the other single. A husband without a wife, or a wife without a husband, is unknown to the law.'"

Tolen v. Tolen, 2 Blackford (Ind.), 407; S. C., 21 A. D. 742, is a careful case, showing that it is not material where the parties were married or where the ground of divorce occurred; that the law of the domicile is the rule of decision in an action for divorce. In this case it was the domicile of the wife who had moved from Kentucky, leaving her husband there; and he was proceeded against by constructive process.

In Van Orsdall v. Van Orsdall, 67 Ia. 35, the wife sued the husband for a divorce in Iowa. The husband pleaded a divorce obtained in Nebraska. The parties were married in Iowa, and the wife had at all times since been a resident of that State. On the day the marriage took place the husband left Iowa and became a resident of Nebraska, and obtained a divorce from the wife in that State, notice of the application being personally served on the wife in Iowa. The court, after holding that the divorce was valid in Nebraska, said:

> "This being so, what effect should be given to the Nebraska divorce in the courts of this State? This has been a fruitful subject of discussion by the text-writers and in the courts of this country. It will be conceded that the authorities are not entirely in accord. The whole subject has been exhaustively discussed in text-books and by judges of learning and ability. We therefore do not deem it necessary to state any reasons in support of the conclusion reached, which is that as the divorce granted in Nebraska is valid there it must be regarded as valid here. In support of this conclusion we refer to Chapter 92 of Bishop on Marriage and Divorce and the authorities cited in notes."

In Rogers v. Rogers, 56 Kas. 481, it appeared that the husband and wife lived in Kansas. The husband deserted the wife and went to West Virginia, where he became a resident, and obtained a divorce without the wife's knowledge. Held valid in Kansas.

In Smith v. Smith, 43 La. Ann. 1140, it appeared that the parties were married in Maine and came to Louisiana to live. The wife left the husband and went back to Maine. She sued there and obtained divorce for cause. Held valid in Louisiana, although service was constructive merely.

In Gregory v. Gregory, 78 Me. 187, the court said:

> "Emery, J. Marriage is a civil status. The rights and obligations of the parties are not merely contractual but are fixed, changed, or dissolved by law. In case of a conflict of laws, the *lex domicilii* controls the status of the person, though his contractual or property rights may be subject to other laws. The State has the absolute right to determine or alter the civil status of all its inhabitants, no matter where they may temporarily be, and no matter where the contracts or acts giving rise to such status may have been made or done. Other States or countries will, in this matter, accept without question the decrees of the courts of the home State."

In Harding v. Alden, 9 Greenleaf (Me.), 40; 23 A. D. 549, it appeared that the husband and wife married in Massachusetts. They then moved to Maine. There the husband deserted the wife and went to North Carolina, where he married again. The wife moved to Rhode Island, and there obtained a divorce. Held, that this divorce on constructive process was valid in Maine and everywhere, and the wife could sue for dower in Maine, where it was allowed in lands of a "deceased" or "divorced" husband. The case is a positive one on these lines.

In People v. Dazwell, 25 Mich. 261, it appeared that the husband and wife resided in Michigan. A suit for divorce was brought in Indiana by the one against the other, the defendant entering appearance. Decree was granted. Held, that the proceeding was void because the Indiana court could have no jurisdiction, neither party being domiciled in that State. Cooley, J., says:

> "The subject-matter of a divorce suit is just as much local as the subject-matter of a suit in ejectment. It is the status of the parties permitted, regulated, and controlled by

the law of their domicile which is to be passed upon and determined, and the appearance of the parties in a foreign jurisdiction does nothing whatever towards transferring the subject-matter."

In striking analogy to this decision is the case of Ellenwood v. Marietta Chair Co., 158 U. S. 106.

In Thurston v. Thurston, 58 Minn. 279, it appeared that the parties lived in Minnesota. The husband went to Washington, and after being resident two months sued for divorce, of which he gave the wife notice only by publication. She had no notice in fact. Held, divorce binding in Minnesota, although the law of Washington required one year's residence; that the relations between the parties being of status, the proceeding was equivalent to one *in rem*.

Gould v. Crowe, 57 Mo. 201, was an action for dower. The husband and wife had been married in Missouri. The husband obtained a divorce from the wife in the State of Indiana on constructive process. The court held the divorce valid and barred dower. Among other things the court said:

"A divorce suit is a proceeding *in rem*. The status of husband and wife is the *res* to be acted upon and dissolved by the decree."

Again:

"Every State or sovereignty has the right to determine the domestic relations of all persons having their domicile within its territory, and, therefore, where a husband or wife is domiciled within a particular State, the courts of that State can take jurisdiction over the status and for proper causes act on this *rem* and dissolve the relation. The decree so pronounced is a judgment *in rem*, and when not effected by fraud, it is valid everywhere; and under the Constitution and laws of the United States such decrees are entitled to full faith and credit in all States and Territories."

Again:

"But the married status being acted on and dissolved by the decree, that relation becomes severed and continues so in

all other States and Territories, and the property rights depending alone upon its continued existence must cease not only in the State where the decree is rendered but in all other dominions. After such dissolution neither party can claim rights depending upon its continued existence."

In Felt v Felt (N. J. Chy. 1898), 40 Atl. 436, the husband got a divorce in Utah from the wife, who had always lived in New Jersey, but it appeared that the husband was at the time and twelve months prior thereto a *bona fide* resident of Utah. Held, divorce was valid. The court said:

"It appears sufficiently for present purposes that the complainant herein has always lived in New Jersey. A very learned and elaborate argument was made in her behalf to support the position that a decree of divorce could not be rendered against her in another State, which would be valid and binding in this State, without actual service of process upon her in that State, or her voluntary appearance therein. The ground of this position was that another State could not obtain jurisdiction of her person, for the purpose of a suit for divorce, by publication or service upon her out of that jurisdiction, and hence the decree was a nullity in this State. I am unable to adopt that view. I think it not only fairly covered by authority in this State, but that it had no foundation in reason. Chancellor Zabriskie, in Coddington v. Coddington, 20 N. J. Eq. 264, held that proceedings with regard to the validity or dissolution of marriage are proceedings *in rem* and actually operate upon the matter, and that the power of the court to deal with the marriage relation depends upon the fact of the domicile of one or both of the parties being within its territorial limits, and that, to enable the court to obtain jurisdiction, one at least of the parties must be domiciled within the jurisdiction. Such domicile gave jurisdiction to proceed and determine the status of the parties. In this case it is an admitted fact that the defendant herein was domiciled in the Territory of Utah for one year before, and at the time the suit was commenced by him and the decree rendered against the wife. The power of the court of that Territory to determine his status as to marriage was complete, and its action must be respected by us, provided it has been based upon grounds recognized as sufficient by civilized peoples, and reasonable notice and opportunity to appear

and be heard has been given to the other party interested. The mere residence of the wife in another State can not affect the jurisdiction in that behalf of the court in which the husband is domiciled. To hold otherwise, as has been done by the courts of New York, in the cases cited by counsel, is, in effect, to deny relief to an injured spouse, provided the guilty party is able to escape beyond the jurisdiction of the court before service of process upon him or her. This vexed question, in all its aspects, has been the subject of much diversity of judicial judgment in the various States of the Union; but I think it may now be considered as settled by the great weight of authority in conformity with the view just expressed."

In Cox v. Cox, 19 Ohio St. 415; S. C., 2 A. R. 415, the wife sued the husband for divorce in Ohio. Husband pleaded divorce obtained by him in Indiana. Husband had deserted his wife in Ohio, and she had no actual notice of the proceeding in the court of Indiana for a divorce nor that a decree had been granted. The court said:

"It is not necessary in this case to examine the decisions favoring the doctrine that a foreign decree of divorce is void where the defendant was non-resident, and there was no jurisdiction of his person except by constructive service; nor those which make the validity of such decree depend upon the place of the marriage or of the offense. The statute and the decisions of this State are to the effect that the place of the marriage, of the offense, and the domicile of the defendant are not necessary to jurisdiction. It is sufficient here that the petitioning party has been a *bona fide* resident of the State for the statutory period, and that the suit is instituted in the proper county. 1 S. & C. Stat. 513; Cooper v. Cooper, 7 Ohio, 594; Mansfield v. McIntire, 10 *Id.* 27. The same rule prevails in many of the other States. Harding v. Alden, 9 Greenl. 140; Ditson v. Ditson, 4 R. I. 87; Tolen v. Tolen, 2 Blackf. 407; Thompson v. The State, 28 Ala. 13; Gleason v. Gleason, 4 Wis. 64; 2 Bish. on M. and D., Chap. XL. The ground upon which the validity of these decrees is maintained is that marriage being a relation involving the social status of a party to it, the State of which the complaining party is a *bona fide* resident has the right to determine his matrimonial status; and, in

view of the new relations that may be formed in consequence of the dissolution of the marriage in the State where the decree is pronounced, that public policy requires the recognition of the validity of such decrees in other States."

In Dorsey v. Dorsey, 7 Watts, 349; S. C., 32 A. D. 767, the wife sued the husband for divorce in Pennsylvania. The marriage had taken place there. The parties removed to Ohio and established their domicile there. While in Ohio the husband deserted the wife, who returned to Pennsylvania. Gibson, C. J., dismissed the suit for want of jurisdiction upon the ground that Pennsylvania would not take jurisdiction of a suit for divorce for a ground which had occurred elsewhere. The reasoning of the opinion, however, is an authority with us.

"Transfer of allegiance and domicile is a contingency which enters into the views of the parties, and of which the wife consents to bear the risk. By sanctioning this transfer beforehand, we consent to part with the municipal governance incident to it; but with this limitation, that we part not with the remedy for past transgressions. Barber v. Root, 10 Mass. 265. On any other principle an offending husband might, by a change of domicile, elude the vigilance of the law; for I know not that the remedy would follow him, or that our law of divorce would be executed by a foreign tribunal, even were it provided with the requisite means."

In Hull v. Hull, 2 Strobhart's Eq. (S. C.) 178, it appeared that the parties lived in Connecticut. The husband abandoned the wife, coming to South Carolina to live; she in Connecticut got a divorce by publication. Held, divorce valid in South Carolina.

In Thoms v. King, 95 Tenn. 60, it appeared that the husband and wife lived in Mississippi. The husband sued the wife for a divorce. The wife, by cross-action, asked for alimony, which was granted. The husband then dismissed his bill and deserted the wife and went to Illinois. After his death the wife sued for dower in land in Memphis, Tennessee. Defendants pleaded

a divorce granted to the husband in Illinois. The wife alleged she had never heard of it until pleaded. Record showed service by publication. Held, divorce valid and dower barred.

"The sixth assignment is that the court erred in not holding that inasmuch as said decree was not predicated upon personal service of process but upon substituted process of publication as to Mrs. Thomas, a non-resident of Illinois, the decree would not bar her right of dower in realty situated in this State. In considering this assignment of error it is an immaterial consideration that the Illinois decree was based upon publication and not upon personal service of process upon the defendant. Mr. Black, in his work on Judgments (Vol. 2, Sec. 932), says: 'So that now the rule may be regarded as settled by the great preponderance of authority that a decree of divorce pronounced by a competent court, in favor of a *bona fide* domiciled citizen of the State and against a non-resident, where service of process was made by a reasonable constructive notice, and in the absence of any fraud or collusion, is valid and binding both in that State and in all other States.' See also Section 931. The author, in stating his text, proceeds upon the principle, which is sustained by the weight of authority, that a divorce proceeding is *in rem*, and, if the petitioner has a *bona fide* domicile in the State where the divorce is granted, it is immaterial that the non-resident is only constructively notified of the proceedings. The author states that the citation should be the best that the circumstances permit, and such as will tend to prevent fraud. But it is by no means necessary that it should be the same as is required to justify a judgment *in personam*. The record in this case shows publication for four consecutive weeks, and that a copy of the notice was mailed to the complainant at Natchez, Miss., by the clerk of the court."

The case of Ditson v. Ditson, 4 R. I. 87, can not be done justice to by any excerpt. It is a thoroughly considered and closely reasoned argument to show that a wife domiciled in that State can have a decree of divorce from her husband which must be valid everywhere, although he did not reside there, and the only notice to him was by publication in the newspaper. Judge Cooley says that "upon the whole subject of jurisdiction in divorce suits no case in the books is more full and satisfactory than that of Ditson v. Ditson." Cooley, Con. Lim. 496, note.

The Massachusetts Cases.

The cases in Massachusetts may be examined with interest.

In Harteau v. Harteau, 14 Pick. 181; 26 A. D. 372, Shaw, C. J., delivering the opinion of the court, said among other things:

> "We consider it to be proved that these parties had *bona fide* changed their domicile and become citizens of the State of New York before the desertion charged. Such being the fact, it seems to us to be the same case as if they had never been inhabitants of this Commonwealth.
>
> "The place where the marriage was had seems to be of no importance. The law looks at the relation of husband and wife as it subsists, and is regulated by our laws without considering under what law or in what country the marriage was contracted. The good sense of the thing seems to be, if the statute will permit us to reach it, that where parties have *bona fide* taken up a domicile in this Commonwealth, and have resided under the protection and subject to the control of our laws, and during the continuance of such domicile one does an act which may entitle the other to a divorce, such divorce shall be granted, and the suit for it entertained, although the fact was done out of the jurisdiction, and whether the act be a crime which would subject a party to punishment or not; that after such right has accrued it can not be defeated, either by the actual absence of the other party, however long continued *animo revertendi*, or by a colorable change of domicile, or even by an actual change of domicile; and that it shall not be considered in law that the change of domicile of the husband draws after it the domicile of the wife to another State so as to oust the courts of this State of their jurisdiction and deprive the injured wife of the protection of the laws of this Commonwealth, and of her right to a divorce."

We have given the facts in the case of Hood v. Hood, 11 Allen (Mass.), 196. The opinion in that case quotes the provision of the Massachusetts General Statutes on this subject, as follows:

> "When an inhabitant of this State goes into another State or country to obtain a divorce for any cause occurring here, and while the parties resided here, or for any cause

> which would not authorize a divorce by the laws of this State, a divorce so obtained shall be of no force or effect in this State. In all other cases a divorce decreed in any other State or country according to the laws thereof, by a court having jurisdiction of the cause and both the parties, shall be valid and effectual in this State."

In Ross v. Ross, 129 Mass. 243 (opinion by Gray, Chief Justice), it is said that the passage of this statute affirming the validity of foreign divorces made no change in the law, but, in the words of the commissioners upon whose advice it was first enacted:

> "It is founded on the rule established by the comity of all civilized nations, and is proposed merely that no doubt may arise on a question so interesting and important as this may sometimes be."

It is to be noticed that there are two clauses—one declaring when a decree shall have no force; the other when a decree shall be effectual. The words "jurisdiction of both the parties" may be open to construction. They certainly do not mean simply jurisdiction by service of process within the State which grants the divorce.

In Hood v. Hood, 11 Allen, 196, the divorce was obtained by the husband in Illinois, the only citation being on the wife in Massachusetts, and it was held valid.

In Burlen v. Shannon, 115 Mass. 447, an Indiana divorce in favor of a husband was held valid in Massachusetts although the wife had never been in Indiana.

Hood v. Hood, 110 Mass. 463, was an action for dower by the same Mrs. Hood who was a party to the other case of Hood v. Hood, 11 Allen, 196. To this action for dower the former decree was pleaded. The court said:

> "The decree in favor of her husband dismissing her libel was then forever conclusive against her as between themselves. It severed the relation between them, or, rather, estopped her from averring any thing to the contrary of the

decree in Illinois which purported to sever that relation. The general rule, however, in regard to estoppels of record is that they are good only between the parties of record and their privies. They can not be set up in collateral proceedings between one of those parties and third persons. But the effect of the judgment in this case was to determine the status of the demandant. So far as it did that it is a judgment that is operative and conclusive as to all the world."

It is to be noticed that in the case of Burlen v. Shannon, the jury had found as a fact that the wife had abandoned the husband. Therefore the court held that Mrs. Shannon's domicile followed that of her husband when he went to Indiana.

In the case of Hood v. Hood the same result was reached as we have heretofore pointed out, because the Illinois decree adjudged that Mrs. Hood had deserted her husband without cause, and she was held to be estopped by that finding.

One of the most recent cases upon the subject is that of Loker v. Gerard, 157 Mass. 42. That was an action by the wife for dower. The defense was a divorce by decree entered in Colorado in favor of the husband. The husband and wife were married in Massachusetts. She deserted him, and he subsequently obtained a decree for divorce in Colorado. The only service was upon the wife in Massachusetts. It was conceded that the husband did not go to Colorado for the purpose of procuring a divorce. The court said:

"It is sufficient for the purpose of the case to say that by our decisions, it not appearing that the wife separated from her husband for justifiable cause, her domicile followed his, and that therefore, for the purpose of divorce, the court in Colorado had jurisdiction of both the parties within the meaning of the Massachusetts statute. The fact that our courts grant divorces under somewhat similar circumstances is a reason why, as a matter of comity, we should recognize the validity of this divorce. We are not now required to consider whether the rule of law would not be the same independently of the legal fiction that the domicile of the wife follows that of the husband."

It would seem to be quite clear from the expressions of Shaw, Chief Justice, in Harteau v. Harteau, above cited, that there could be no doubt of the validity of a divorce in a case where one spouse left the matrimonial domicile and the other spouse obtained a divorce from a court of the matrimonial domicile.

Indeed, the case of Shaw v. Shaw, 98 Mass. 158, is a direct authority for the proposition that a woman domiciled in Massachusetts can obtain a divorce *a vinculo* from her husband, domiciled in another State, upon process, not served within the State of Massachusetts.

If this is true, the converse must be likewise true—that a husband domiciled in a State can obtain a divorce from his wife, even though she be elsewhere domiciled, and that such divorce can be obtained upon constructive service.

Certain Cases Supposed to be Contra.

The most elaborate attack upon Bishop's view of this general question is contained in the case of McCreary v. Davis, 44 S. C. 195.

In that case it appears that a citizen of South Carolina married in New York. The husband and wife came to South Carolina to live. The wife left her husband and went to Illinois, where she obtained a divorce in accordance with its laws, but without personal service or appearance of the husband, on a ground not recognized as cause for divorce in New York or South Carolina. It was held that the Illinois judgment was void in South Carolina.

The court, however, cites, without disapproval, the case of Hull v. Hull, 2 Strobhart's Eq. 178. The distinction between the cases is that in the Hull case the wife obtained her divorce at the matrimonial domicile.

Whether this is a sound distinction or not, it shows that even in South Carolina such a divorce as is here pleaded would be valid.

So far as our researches have gone we have found but three cases in which a judgment for divorce at the matrimonial domicile against an absent defendant constructively served has been held not valid. These cases are:

McCarthy v. DeCaix, 2 C. & F. 568. This is a judgment of Lord Brougham's to which we have heretofore adverted, and the decision has been so universally discredited as to no longer be worthy of construction.

In that case the husband and wife had been married in England, but had gone to Denmark to live. In Denmark the husband obtained a divorce from his wife. The question was upon the distribution of his personal estate after his death. It is obvious that this personal estate, according to all rules, was distributable according to the law of his domicile, and therefore to disregard the decree of divorce obtained in the domicile in the distribution of his personal estate was obviously at war with all the principles governing such a subject.

The second case is that of Irby v. Wilson, 1 Dev. & B. (N. C.) 578. In that case it appeared that the parties were married in South Carolina. After some years they moved to Tennessee. The wife abandoned the husband and came to North Carolina. The husband obtained a divorce in Tennessee on publication, and the wife then married again in North Carolina. It was held there her second marriage was void.

This case was certainly discredited if not overruled in State v. Schlachter, 1 Phillips Law (N. C.), 521.

In that case it appeared that the parties were married in New York; then moved to North Carolina. The wife moved back to New York. There she obtained a divorce on publication, and married again and came with her second husband to North Carolina to live. It was held that she could not be indicted for a misdemeanor in living with the second husband.

It is only fair to say that in Arrington v. Arrington, 102 N. C. 491, it is said that the case of Irby v. Wilson has not been overruled; but there was nothing in the Arrington case to call for such a pronouncement.

The third case is the one now at the bar.

We believe that it is not only at war with the authorities everywhere else, but is an extension of the New York doctrine, not warranted even by the preceding cases in that State. This can be shown by a review of the decisions cited by the Court of Appeals in its opinion. They are as follows:

Review of the New York Cases.

Williams v. Williams, 130 N. Y. 193. In this case Mary Williams sued Cornelius Williams for divorce from bed and board. There was a judgment for the plaintiff, awarding alimony, costs, and counsel fees. It was modified and affirmed by the General Term, and then affirmed by the Court of Appeals. The action was based upon the allegation that the husband had abandoned the wife in August, 1882. The husband denied this, and alleged that the wife had abandoned him in 1880. He further set out in his defense a judgment of divorce in his favor from the wife, rendered in the District Court of Ramser County, in the State of Minnesota, in January, 1884. The parties were married in New York in 1879. The husband resided in New York until August, 1882, when he removed to Minnesota. The wife continued to reside in New York, and was, at the commencement of the action, a resident of New York. The summons and complaint in the Minnesota action were personally delivered to the wife while temporarily stopping in Philadelphia. The court found as a fact that the husband abandoned the wife in August, 1882. It appeared that there had been a disagreement between the parties, the wife, through the fault of the husband, leaving him; but before the husband left the State of New York she offered, unconditionally and in good faith, to return to him. He refused to allow her to do this, left New York, and took up his residence in Minnesota.

Under these circumstances the decree of the Minnesota court was held not to be binding upon the wife.

Now, it is to be observed of this case that while both husband and wife were residing in the State of New York the husband abandoned the wife and removed to Minnesota, refusing to allow his wife to go with him; that he obtained his judgment for divorce in Minnesota upon the allegation that his wife had abandoned him in 1880, which was two years before he himself left the State of New York. It further appears that the wife had continued to reside in the State of New York. The husband then, having given his wife a ground for divorce at the matrimonial domicile, abandoned the matrimonial domicile and went off to live in another State, refusing to allow his wife to follow him. She remained at the matrimonial domicile. He endeavored to obtain a divorce from her in the other State in which he had taken up his residence, his ground for divorce being one which did not occur in that State, but which, if it occurred at all, occurred in the State where and when he and his wife were domiciled, and where she had continued to be domiciled.

Rigney v. Rigney (127 N. Y. 408).

This was an action in New York upon a decree obtained by the wife against her husband for alimony in the State of New Jersey. It appeared that the parties were married February 12, 1873, in New York, and continued to reside in New York until January 18, 1877, when they removed to Elizabeth, N. J., where they both resided until January, 1883, when the husband abandoned his wife in New Jersey and thereafter resided in the State of New York, the wife continuing to reside at Elizabeth, N. J. On the 23d of April, 1883, the wife filed a bill in the Court of Chancery of New Jersey for divorce from her husband. On the 4th of August, 1883, the husband appeared to the suit and filed an answer denying the allegations. On the 21st of April, 1886, the wife filed a supplemental bill alleging a ground of divorce that had accrued since the commencement of the suit. A certified copy of an order directing the defendant to answer and of the supplemental bill was served on the defendant in New

York. It was recited in the order directing this service that the defendant (the husband) was then a resident of New York. He did not appear to the supplemental bill, and a decree was taken upon it, finding its allegations true, decreeing a divorce and alimony. This court held that it was necessary, under the laws of New Jersey, for process to have been served upon the supplemental bill; that the appearance to the original bill was not an appearance to that; that a suit for divorce, although not strictly a proceeding *in rem*, was of the nature of such a proceeding or *quasi in rem*, but only in so far as it affected the marital status of the parties; that as to the judgment for alimony and costs, it was a proceeding *in personam*. Therefore the court held that the decree of alimony and costs could not be made the basis of an action in the courts of New York.

This case was, however, reversed by this court. The syllabus in the reported case states "that the New York courts did not give due effect to the provisions of Article IV of the Constitution of the United States, which requires that full faith and credit shall be given in each State to the judicial proceedings of every other State." Laing v. Rigney, 160 U. S. Rep. 531.

In that case a question was raised as to whether there was jurisdiction in the New Jersey court to grant the decree for alimony and costs—the supplemental bill and rule to plead, under which it was granted, not having been personally served.

Mr. Justice Shiras, in the opinion, holds that against the testimony of the expert the finding of the New Jersey court will stand. "So long as this decree stands, it must be deemed to express the law of the State." Opinion of Mr. Justice Shiras, 160 U. S., at page 542.

The reasoning in this case even of New York Court of Appeals, if followed, would lead to the reversal of the case at bar.

De Meli v. De Meli (120 N. Y. 485).

This was an action by the wife for separation on the alleged ground of cruel and inhuman treatment, and a counterclaim by the husband for abandonment and other charges. The action

and cross-action were both dismissed. It appeared that the parties were married at Dresden in March, 1870, and in October, 1881, the wife left her husband at Dresden and came to New York, and in March, 1882, commenced this action for separation. The court found that at the time of the marriage in Dresden and since then, to and including the time of the commencement of the action, both parties were and continued to be residents of the State of New York. The husband had procured a divorce on constructive service of process from the wife in Dresden. This decree was disregarded. The judgment of the court below was affirmed. The court held that if the domicile of the parties had been in Germany the German court would have had the jurisdiction, although the defendant in the action was then absent from the Empire, and did not in any manner appear in the action or proceeding. The court said:

> "In such case the party whose domicile is in a country is subject to its laws, and jurisdiction of his person as well as of the subject-matter may be acquired by the court by means of substituted service in the manner provided, if provision for such purpose is made by its laws, although the party sought to be charged by an action brought against him is then absent from the country and can not be personally served with process within it."

But the court held, as above, that both parties were at the time of the action in Germany residents (that is, domiciled) in the State of New York, and that, therefore, jurisdiction could not be acquired in Germany by substituted process.

The most that can be claimed for that case is that it held that where husband and wife were both resident (that is, domiciled) in the State of New York and happened to be abroad, and the wife, leaving her husband, returned to New York, the husband could not invoke the jurisdiction of the court of the foreign country and by substituted process bind the wife by its decree.

Jones v. Jones (108 N. Y. 415).

In that case the husband brought suit against his wife for divorce in New York, but before this suit was tried the wife obtained a divorce in Texas dissolving the marriage, and pleaded that judgment as a defense. There was a judgment for the wife. The husband appealed; judgment affirmed. The parties were residents and citizens of the State of New York, where they married in 1875. They lived together until 1878, when they separated. The wife went to the home of her parents in the State of New York, and then removed with her parents to the State of Texas, where she remained from that time. The husband answered in the Texas case, and for that reason was held to be bound by its judgment. The court said it would have held otherwise that it was void, but this would be no more than saying that where a husband and wife—residents of the State of New York—become separated, the wife going off to another State and there endeavoring to bring an action against her husband for divorce, without personal appearance, a judgment in such an action will be disregarded.

Cross v. Cross (108 N. Y. 628).

Action by the wife for separation against her husband; judgment for the wife, husband appeals. Among other defenses by the husband was a judgment of divorce obtained by him in Illinois. The opinion is only a memorandum one, and there was no reported opinion in the Supreme Court, General Term. The case is rather obscure. It does appear, however, that when the Illinois judgment was rendered, and during the pendency of the Illinois suit, the wife was domiciled in New York; was not served with process; did not appear in the action, and had no actual notice of its existence until copy of the final decree was served upon her. It was held that the judgment was void. The opinion proceeds:

It is also claimed that the court erred in admitting evidence to show that the defendant (*i. e.*, the husband) was not a resident

of Illinois when he obtained his decree. The jurisdiction of that court was open to assault in spite of the recitals in the judgment, and so it was competent to question the truth of the foreign residence. (Kerr v. Kerr, 41 N. Y. 272.) If the plaintiff had appeared in the Illinois action, or ought to have so appeared, and the question of residence had then been litigated, the decision of the court might have been conclusive; but since no process was served upon her in this State, and she had no notice of the action, she had no opportunity to be heard, and is not bound by the finding of the decree.

The opinion does not show where the separation between the husband and wife occurred. An examination of the appeal book, however, shows that the parties were married in Brooklyn in 1854, and lived there until 1878. The husband then abandoned the wife, and in 1879 went to Illinois, where he brought his suit. Thus it is obvious the case has no application to the one at bar. Moreover, the court calls attention to the fact that the wife had no actual notice of the existence of the suit, and says that if she had appeared, or ought to have appeared, in the Illinois case, the fact of residence there found would have been conclusive. If the court means to say that she ought to have appeared if she had received notice such as is required under the Illinois law for constructive process, then in another feature that case is different from the one at bar.

O'Dea v. O'Dea (101 N. Y. 23).

That was a suit by a husband to declare void his marriage with the defendant, his wife, upon the ground that she had another husband living. It appeared that the woman was a resident of Canada; that she was married in Lewistown, New York, to one K., and lived with him as his wife until January, 1860, when she left him and returned to Toronto, where she continued to reside until 1865. K. moved from New York to Cuyahoga County, in the State of Ohio, and in March, 1864, obtained a divorce from her. She received the summons by mail, and was

present during the taking of several depositions. The divorce was granted in Ohio on the ground of desertion. It was held that the divorce was void, and therefore that the second husband was entitled to the relief asked.

The opinion is *per curiam*. It appears that Judges Ruger, Rapallo, Andrews, and Earl voted for it; Miller, Finch, and Danforth against it. It is to be observed that the ground for divorce accrued in the State of New York while both husband and wife were there domiciled; that the husband moved to Ohio and there obtained his divorce. It is hardly to be imagined that the court would have held to the same view if K., instead of going from New York to Ohio and getting his divorce, had obtained it in New York, where both he and his wife were domiciled when the cause of action accrued; and it is hardly to be imagined that the court would have held that under such circumstances he would have been prevented from obtaining his divorce by the fact that his wife in abandoning him had gone to Canada; yet, to make that case square with the one at bar, a divorce obtained by K. in New York, where he and his wife were domiciled at the time the cause of action accrued, must be held to be ineffectual by reason of the fact that his wife had removed to Canada, although in exactly such a state of case the law of New York provided for constructive service of process.

People v. Baker (76 N. Y. 78.)

This was an indictment for bigamy. It appeared that the defendant Baker was married in 1871 to Sallie West in the State of Ohio; that in November, 1874, while she was still living, he married Eunice Nelson at Auburn, New York. The first wife obtained a divorce from Baker in the State of Ohio. It appears that after the marriage between Baker and Sallie West, the husband and wife resided at Rochester, in New York, and that he continued to reside in that State until after the final judgment of divorce was rendered. Under these circumstances it was held that the judgment for divorce was void as to Baker, and that he remained a married man.

Here again it is to be observed that the cause of action accrued in New York while the husband and wife were domiciled in New York, and that the wife, instead of suing Baker in New York, left that State and went to Ohio, where she sued him, serving him constructively. The court seems to have held that there was no obligation upon Baker to follow his wife to Ohio, and that she had no right to call him there on a ground of divorce which had accrued in New York while he and his wife were there domiciled.

In reference to Hunt v. Hunt (which is the next case we shall notice), the court, in People v. Baker, said that that case was close; that it went upon the grounds built up with elaboration, that both parties were domiciled in Louisiana when the judicial proceedings were there begun, and there continued when the judgment was rendered, and so subject to its laws, including those of substituted service of process; that it was meant to keep the reach of the judgment within the bounds fixed by the facts in that case. Church, Chief Judge, dissented from the judgment of the court.

Hunt v. Hunt, 72 N. Y. 217 (opinion by Judge Folger), comes nearer this case than any other to be found in Court of Appeals reports.

This was an action by the wife for divorce. The defense was that the defendant (the husband) had been divorced from the plaintiff by a judgment of the Louisiana court. It appeared that the husband and wife were married in the city of New Orleans, they both being residents and citizens of that State; that they continued to reside in New Orleans until after the 1st of April, 1869, at which time the defendant left the home of her husband and said city and State; that the husband continued to reside in New Orleans, and that he obtained a divorce there by constructive service of process. It was held that the judgment for divorce was valid.

The Hunt case is less strong than the one at bar, because it appears that the divorce was obtained under a law passed sub-

sequent to the time that the wife left the State of Louisiana and came to the State of New York.

It is of course contended that this case is limited by the observation of the court to the effect that the wife, in abandoning her husband in Louisiana and in coming to New York, did so in the absence of any conduct on his part which would authorize the court to grant her a limited or an absolute divorce; and it was further contended that it was for the New York court in our case to consider the complaint of Mrs. Atherton, and to determine whether she had sufficient ground for abandoning her husband to entitle her to a limited divorce; that having such grounds, she was entitled to a decree in this cause, and to have the Kentucky judgment disregarded.

As we have argued above, the logic of such a contention applied to the case at bar is fatally defective. In Kentucky Mr. Atherton was not allowed to obtain a divorce for the abandonment of him by his wife, unless such abandonment was without fault upon his side. When, therefore, the Kentucky court came to consider Mr. Atherton's complaint, and to pass upon the rights of the parties and the cause of action alleged by him, in order to render a decree in his favor it was bound to ascertain and adjudge not only that Mrs. Atherton had abandoned him, but that she had abandoned him without fault on his part.

It is, therefore, a matter of judgment, and as much a part of the judgment of the Kentucky court as any other thing in it, that Mrs. Atherton's abandonment was without Mr. Atherton's fault. If it was without Mr. Atherton's fault, then obviously she had no ground for an action either for limited or absolute divorce.

To inquire into the history of the lives of the parties in order to ascertain whether Mrs. Atherton is entitled to a limited divorce is one thing; to inquire into these same facts in order to determine that the Kentucky court has no jurisdiction is another thing.

In other words, we believe it to be a thing unheard of to challenge the jurisdiction of a court by showing that its judgment was

erroneous; and that it is going a bowshot beyond this to challenge the jurisdiction of a court by showing that its judgment upon the merits of the action was erroneous, in view not of facts which are proved in that record, but in view of facts which are proved in the new record.

We therefore submit that as the judgment was obtained in Kentucky, where Mr. and Mrs. Atherton were both domiciled during their whole married life, and where they were both domiciled when the cause of action accrued, and where it was necessary for Mr. Atherton, in order to obtain the decree, to prove that he was without fault, and where the proceedings were taken under a law which was in existence during the whole of their married life, and by process which was authorized by law during the whole of their married life, we have a case as strong as it is possible to make it of the jurisdiction of the domiciliary tribunal to declare, according to law and by force of process in existence while the domicile actually existed, the marital status of both parties.

Hoffman v. Hoffman (46 N. Y. 30).

This was an action by the wife for a divorce. The answer set up a decree of divorce obtained by the defendant in the State of Indiana. The only question in the case was as to whether this judgment of divorce obtained by the husband was valid. It was held that it was not valid, because it appeared that at the time the judgment was obtained in Indiana both husband and wife resided in the State of New York.

Kerr v. Kerr (41 N. Y. 272).

This was a contest for administration between two Jane Kerrs, each one claiming to be the widow of Richard Kerr. The question turned up whether Richard Kerr had been divorced from Jane Kerr No. 1. It appeared that he had obtained a divorce in the State of Indiana, but that at the time he brought the suit he was not a citizen of the State of Indiana, but was a citizen and resident of the State of New York, and it was therefore held that the decree of divorce was void.

A brief resume of the cases in New York is as follows:

In the Williams case, the separation occurred while the parties were domiciled in New York, the husband going to Minnesota, refusing to allow his wife to follow him, and there obtaining his divorce.

In the Rigney case, the only doubt was as to the validity of the judgment so far as it was for alimony and costs, *in personam*.

In the De Meli case, while both parties were domiciled in New York, the husband sued in Germany.

In the Jones case, the parties separated in New York, and the wife went to Texas and there sued.

In the Cross case, the parties separated in New York, and the husband went to Illinois to sue.

In the O'Dea case, the parties separated in New York, and the husband went to Ohio to sue.

In the Baker case, the parties separated in New York, and the wife went to Ohio to sue.

In the Hunt case, the parties separated in Louisiana; the husband stayed at home; the wife came to New York, and yet a judgment in favor of the husband, on constructive process in Louisiana, was held valid.

In the Hoffman case, the parties separated in New York, and the husband went to Indiana to sue.

In the Kerr case, the parties separated in New York, and again the husband went to Indiana to sue. Indeed, in both of these cases (the Hoffman and the Kerr cases) it was found that at the time the husband obtained his divorce in Indiana he was a citizen of New York.

That we are not making a distinction which is novel to the administration of the law in these cases by the judgments of courts inferior to the final court will appear from the following:

In Morrison's case, 52 Hun, 102, the husband obtained a divorce from his wife in Ohio (the matrimonial domicile) while the wife was residing in New York, and it was held that the divorce was valid.

This case was affirmed by Court of Appeals.

Matter of Morrison, 117 N. Y. 638.

In the DeGaramo case, 86 Hun, 390, the wife abandoned the husband in New York, and obtained a divorce in Michigan. The divorce was held void.

Matter of DeGaramo, 86 Hun, 390.

In the Campbell case, the husband and wife were residing in Pennsylvania. The husband left Pennsylvania and came to New York. The wife obtained a divorce from him in Pennsylvania, and it was held that the divorce was valid.

Campbell v. Campbell, 90 Hun, 233.

In the Dennick case, the husband and wife were living in Michigan. The husband was brought to New York on an extradition warrant, and here shut up in the State's prison. The wife obtained a divorce from him in Michigan. It was held that the divorce was valid.

Matter of Dennick, 92 Hun, 161.

In the Bell case, the husband and wife were residing in New York. The husband went to Pennsylvania and obtained a divorce from the wife. The court held that the divorce was void.

Bell v. Bell, 4 App. Div. 527.

In the McGown case, the wife separated from the husband in New York and went to Dakota to obtain her divorce, and it was held void.

McGown v. McGown, 1 App. Div. 368.

We submit that up to the decision of our case there was no authority in New York which infringes upon the rule we have heretofore quoted as having been formulated by the Massachusetts commissioners.

Nor is there any ground for saying that the test of validity is the ground of divorce, and whether it is one recognized in New York. It would be easy to show this from the cases.

The extraordinary result of these New York decisions has not gone without vigorous comment in that State. Thus in Davis v. Davis (1893), 2 Misc. R. 549, there was an action by Carrie Guran Davis against Simon Davis to annul the marriage of plaintiff to defendant. Judgment for plaintiff.

In a suit in Massachusetts by this defendant against a former wife, proceeding on a constructive service of process by publication, he obtained a decree of divorce for desertion. That decree was challenged as a nullity, for want of personal service and of an appearance by the defendant therein.

Pryor, J., said:

"As the marriage purporting to be dissolved was not celebrated in Massachusetts, as the defendant in the divorce suit was not domiciled in that Commonwealth, nor was served with process there, nor appeared in the action, it results that, by the law of New York, the judgment against her is of no effect; that she is still the wife of the defendant; and that, by necessary consequence, his marriage with this plaintiff is a nullity. . . . To this conclusion I am compelled, but I am not forbidden to say that my reason revolts against it. By the law of Massachusetts its court had jurisdiction of the defendant in the divorce suit, and the decree of the divorce is valid and conclusive. By virtue of the supreme law of the nation, 'a decree in divorce, valid and effectual by the laws of the State where obtained, is valid and effectual in all other States' (Cheever v. Wilson, 9 Wall. 109), and yet I am to declare this Massachusetts judgment a nullity. And why? Because the jurisdiction of the Massachusetts court rests solely on a constructive service of process by publication; and by the law of New York such service is of no avail. But such constructive service of process is the only foundation of the jurisdiction of this court in the present case; yet, by the law of New York, such service gives jurisdiction to its court, and the judgment I am to render is not only valid, but of so transcendent an efficacy as to impeach the records and cancel the judicial proceedings of another State. In reason, such service of process should be sufficient in both States, or in neither.

"Equally anomalous will be the effect of the judgment of this court on the relation and rights of the parties. In

Massachusetts, not the former spouse, but this plaintiff, is the lawful wife of the defendant; while in New York the former spouse is still the wife of the defendant, and his connection with the plaintiff a crime. Indeed, relying on the nullity of the Massachusetts decree, the former wife has instituted here an action for divorce from the defendant, on the allegation that his marriage with this plaintiff is an adulterous association. The executive of New York may demand from Massachusetts the rendition of the defendant as a bigamist; but can he be a bigamist whom Massachusetts has released from the former marriage? The absurd and mischievous consequences of the present judgment do not relieve me from the necessity of pronouncing it; but perhaps the exposition of them may not be amiss in the prevalent agitation for a uniform system of marriage and divorce. Judgment for plaintiff."

We therefore submit that the judgment now under consideration is opposed to reason, international comity, the constitutional rule of "full faith and credit," the opinions of this court, of all the text-writers, of the cases in England and Scotland, and in every court of the Union (except, perhaps, North Carolina), and is not even warranted by the former adjudications in New York.

There was no Evidence to Support the Finding that Mrs. Atherton was a Resident of the State of New York.

It has been decided many times in this court that as it obtains its jurisdiction to revise the judgment of the highest court of a State by writ of error and not by appeal it can not re-examine the facts found by the State court. The cases, however, have none of them gone to the length of holding that this court is bound by the facts found by the State court as to the Federal questions upon which this court takes jurisdiction.

In the case at bar the Kentucky decree adjudged that Mrs. Atherton had abandoned Mr. Atherton without his fault. The New York courts, in order to get rid of that judgment, and as a necessary element in their process of destruction, reversed this finding and declared that Mrs. Atherton had good ground for leaving Mr. Atherton—such good ground as entitled her to acquire a separate domicile.

Surely, when we come to this court to insist upon full faith and credit being given to the judgment of the Kentucky court we can not be turned away with the statement that so far from the Kentucky judgment being conclusive, the New York judgment, in its findings of fact, is conclusive upon the point that the Kentucky judgment is not conclusive.

It seems to us to be clear that the question of fault between Mr. and Mrs. Atherton was set at rest by the Kentucky judgment; but if this is not true; if, under the guise of ascertaining whether the Kentucky court had jurisdiction, the New York court can examine the facts lying at the basis of the Kentucky judgment, then surely we must be able to come here and show that the evidence admitted by the New York court and held to be sufficient to destroy the jurisdiction of the Kentucky court was neither competent nor sufficient for that purpose.

Two propositions must be considered established before the New York rule can be applied:

These are, first, that the wife had the right to acquire a separate domicile. Second, that she did in fact acquire a new domicile. To ascertain the first the New York court inquires into the facts and circumstances of the married life of Mr. and Mrs. Atherton. A just conclusion upon this subject can be reached by a tribunal sitting in Kentucky or by a tribunal sitting in New York. It is obvious that if Mr. Atherton were to choose the tribunal, he would select the one which was held in a State where he was born and where he had lived all his life through. Mrs. Atherton, on the contrary, would select one in which she was born and where she had lived the most of her life. Two judges, equally intelligent and equally just, might differ in their conclusions upon such a subject as this, and this difference might have its foundation in the reputation of the one party or the other in the community where the judge was sitting. This is peculiarly so in a suit for a divorce.

We confess that we were greatly disappointed at the severity of the findings of the trial judge. We do not propose to enter

into an analysis of the testimony upon the subject of the domestic relations of Mr. and Mrs. Atherton. We think, however, that we have the right to ask the court, when it shall have read the findings of the trial judge, to consider two things which seem to us to be most pertinent. One of these is the address delivered by the trial judge to the parties after all the evidence upon Mrs. Atherton's side was in, and before Mr. Atherton had completed his statement. This address is at pages 98 and 99 of the Record.

How the trial justice, having said what he there said, could afterwards make the findings of fact which he did make passes our comprehension.

Again we ask the court to read the evidence of Mrs. Atherton at page 24 of the record—what she says occurred on April 23, 1890; and to read what she says in her complaint occurred March 21, 1890, April 18, 1890, and April 23, 1890 (Record 184–185), and then to read the letter which she admits she wrote on April 24, 1890. (R. 24.)

From the opinion of the Supreme Court, General Term, we make the following extract:

> "Although a very extensive argument has been addressed to this court upon the subject of credibility of the plaintiff as a witness in her narration of the scenes and events and misfortunes which attended her in her married life, we are pressed to say that her statements thereof are 'most uncandid,' and that 'strong side light' is thrown against her by letters written, and her testimony somewhat shaken by witnesses who speak in behalf of the defendant, as to some of the important transactions that she relates, and in others she has, to some extent, colored and magnified them; still, considering the evidence which tends to corroborate her, and, to some extent, tending to establish important facts involved in the numerous inquiries that were opened at the trial, we are inclined to accept the conclusions of fact upon the essential features of the case as found by the Trial Court."

We feel that justice to Mr. Atherton compels us to make at least these references to the Record. With them we will leave

this subject and consider the evidence as to whether, assuming Mrs. Atherton had the right to change her domicile, she did in fact become domiciled in New York and was there domiciled at the time the Kentucky suit was brought.

Mrs. Atherton's domicile and actual residence was in Kentucky up to October, 1891.

There was no evidence whatsoever to justify the findings "that the plaintiff resided in Clinton; that she left Kentucky for the purpose and with the intention on her part not to return to but permanently become a resident of and reside in the State of New York, and that the purpose and intention was thoroughly understood by the defendant at the time. . . . That her intention of not returning to the State of Kentucky, but to permanently reside in the State of New York, was contemplated and evidenced by the said agreement entered into between the plaintiff and the defendant." (R. 221.)

The only positive testimony on the subject was the testimony of Mrs. Atherton, as follows:

> "I remained at the Galt House, I think, about ten days, and then returned to my mother at Clinton, and have lived with her ever since; that has been my residence since; my mother has a lovely place. . . . I went to my mother with the intention of making that my home; that has been my home; has been practically my home, and that was my intention at that time." (R. 18.)

The fact is her mother had rented out her house, and Mrs. Atherton, leaving Louisville October, 1891, did not set foot in Clinton until May, 1892. (R. 57.)

From this evidence there is no basis for the findings above referred to, especially the one taken in connection with the facts which led to her departure from the State of Kentucky.

The trial justice erred in finding that her intention to permanently reside in the State of New York was contemplated and evidenced by the agreement entered into between the parties.

The agreement is absolutely silent upon the subject. (Agreement R. 174.)

Nor can such inference be drawn from its terms. The preamble expresses the intention of preserving the rights of each of the parties, and in this was included, in case of a continued abandonment by the wife of the husband, his right to procure a divorce.

Nor can any such inference be predicated from the fact that under Paragraph II provision is made for the expense of conveying the child, with a proper attendant, in the journey to its mother and back again. (R. 174.)

This provision is not inconsistent with a residence by the mother at some other point in Kentucky; nor is it inconsistent with the probability of the mother's traveling with the child during summer months, to watering-places, or elsewhere, for recreation and other purposes. No reference whatsoever can be spelled out to the mother's going to New York rather than to Washington, to Florida, or to any other place of temporary sojourn.

When a wife separates herself from her husband, there is no law by which he can restrain her movements. He can not put her in jail, nor issue a writ of *ne exeat*. He can agree that if she happens to be in a different place from him he will pay the expense of conveying his child from that place to the place where he is, and of returning the child to the same place or a different one.

This evidence in regard to Mrs. Atherton's departure from Louisville, and as to what was her intention, or the husband's intention, or the husband's agreement, or his acquiescence, are founded entirely upon the untenable proposition that he had the right to control her movements. No man can be said to consent to that which he has no power to prevent. Whatever our former notions may have been in regard to the right of a husband to the forcible caption and retention of the body of his wife, they have certainly been exploded by a celebrated case in England, where it was held that upon the husband's attempting to restrain the freedom of his wife she was entitled to the writ of *habeas corpus*.

Queen v. Jackson, L. R. (1891), 1 Q. B. 671.

In Warrender v. Warrender, 2 C. & F. 488, it appeared that at the time the husband and wife separated there was an agreement of separation by which the husband was to maintain the wife. Accompanying the agreement but not as a part of it, the husband delivered the following letter to the trustees in the articles of separation:

> "My Lord and Sir:
>
> "Although I have objected to having any clauses inserted in the articles of separation between Lady Warrender and myself which should contain a permission from me to her to go and reside where she pleases, or which should preclude me from suing her in the Ecclesiastical Court for restitution of conjugal rights, I hereby pledge myself that Lady Warrender shall be at liberty, during our separation, to go and reside where she pleases, and that I will not institute any suit against her for the purposes mentioned.
>
> "I am, etc.,
>
> "G. WARRENDER."

And yet it was held in that case that this paper in no way affected the question of the right of the wife to acquire a domicile separate from her husband or his right to maintain an action for divorce against her at the matrimonial domicile.

In the agreement it is expressly provided that the domicile of the child is to be the State of Kentucky, and so far from an inference being drawn that the domicile of the mother shall be in another place, the inference should be exactly the other way.

We respectfully urge that the contrary is the fair and legal inference to be drawn, *i. e*, that the domicile of the father and of the child—the marital domicile—shall continue to be the domicile of the mother.

The statement by the clerk of the court that in the Kentucky action Mrs. Atherton was proceeded against as a non-resident is a mere inadvertent expression, and is but a clerical error. The petition and affidavit is simply that she has been absent from the State four months. (R. 150.)

She was treated and regarded as an "absent defendant," and so adjudged. (R. 152.)

In the reply of Mrs. Atherton to the answer in this action (which sets forth the agreement) Mrs. Atherton positively avers that she was induced to sign the agreement, and it was stated and represented to her "that such agreement was not and would not be permanent, and that it was intended to be and would be a mere experiment and temporary arrangement." (R. 219.)

"But for the fact that she understood and believed that the agreement would not be permanent; that it was intended to be and would be merely an experiment and temporary arrangement . . . this plaintiff would not have consented to sign and would not have signed the said agreement."

"That at the time the said agreement was signed it was not intended or understood, by any of the parties to the said agreement, that such agreement was or would be permanent, but that it was intended and understood by such parties to be merely temporary and experimental." (R. 220.)

In her testimony on the subject she said that her understanding was that the contract was an experiment, and was to last a year only. (R. 147.)

Thus her own testimony is wholly inconsistent with her making or having made a permanent or any change of residence. Although she went to Clinton to her mother, it could not be that she contemplated a change of residence.

These positive, solemn, and formal allegations made in her pleading in this action are consistent:

1. With the presumption of law as to her marital domicile.
2. With the actual facts as to her place of residence.
3. They are confirmed by her own testimony, and in the whole case there is nothing to justify the finding that she permanently or at all changed her place of residence.

The findings, therefore, that Mrs. Atherton ceased to be a resident of the State of Kentucky, being without evidence to support them, must fall. The true doctrine is that laid down in the Le Mesurier case, above cited, L. R. App. Cases (1895), 517, that domicil in such a connection as this means not residence

nor abiding place, but that country which on the death of the party would control the succession of his property, hence the country which there is a fixed intention to hold as the place of one's citizenship. And the case of Shaw v. Shaw, 98 Mass. 158, and many others prove that a new domicil is not obtained by merely abandoning the old with the intention of acquiring the new domicil. It must be actually acquired before there is a change.

The Decree For Alimony.

In New York a suit for alimony can not be brought as separate from an action for divorce. Therefore when it appeared that Mr. Atherton was not Mrs. Atherton's husband, Mrs. Atherton's complaint should have been dismissed, and would have been dismissed if such had been the conclusion of the New York Court. Ramsden v. Ramsden, 91 N. Y. 282.

CONCLUSION.

Mr. and Mrs. Atherton separated in October, 1891. The agreement which was at that time made between them as to the custody of their child we have given in the early part of this brief. It will hardly be contended that Mrs. Atherton has even made an effort to live up to that agreement. Singularly enough, the New York Court of Appeals finds in the conduct of the parties an abandonment of the agreement. Thus the court said:

> "We are of opinion that the suit for absolute divorce brought by the husband in Kentucky in December, 1892, and the action for limited divorce instituted by the wife in this State in January, 1893, both having proceeded to judgment, may be regarded as a mutual abandonment and termination of the agreement under its terms, and left the court below free to act as it deemed proper respecting the alimony of the wife and the custody and maintenance of the child."

The agreement expressly provides for just such a contingency as the learned court declares evidences its abandonment. We do not, of course, claim that it is a Federal question as to what the New York courts shall do with the child. It is within the territorial jurisdiction of those courts, and the power belongs to the courts to control the custody. There is, however, we think, something wrong somewhere to produce such scant comity. The judgment of the Kentucky court was absolutely disregarded by the New York court. Mr. and Mrs. Atherton solemnly agreed that each was to have companionship of this child. They live in different States. They agreed that the domicile of the child should be the State of Kentucky. All this is answered by the Court of Appeals in one sentence. It says:

> "The husband and wife had sought relief in the courts, and the interests of the child were safe with the Supreme Court of the State guarding her rights."

We may ask, would the interests of the child have been less safe if the courts of Kentucky had been left to guard her rights?

The simple fact is that the New York court so much fears that the Kentucky court will not require Mr. Atherton to allow Mrs. Atherton her fair share in the companionship of the child that they remove all temptation to injustice by the Kentucky courts through the simple expedient of depriving Mr. Atherton of all share in such companionship.

We respectfully submit that the judgment in this case should be reversed.

ALEX. POPE HUMPHREY,
GEO. M. DAVIE,
Counsel for Plaintiff in Error.

APPENDIX.

OPINION OF NEW YORK COURT OF APPEALS.

MARY G. ATHERTON, - - - - - - *Respondent,*

VERSUS

PETER LEE ATHERTON, - - - - - *Appellant.*

1. Husband and Wife—Domicile; Divorce. A married woman may acquire a separate domicile in another jurisdiction than that of her husband's domicile when it is necessary for her to do so by reason of his conduct, such as cruel treatment entitling her to a limited divorce.

2. Separate Domiciles in Different Jurisdictions—Wife's Action for Limited Divorce in this State Not Barred by Decree of Absolute Divorce Obtained by Husband in State of his Domicile, Void for Want of Jurisdiction of Person. Where, in an action brought in this State by a wife whose husband's domicile is in another State for a limited divorce on the ground of cruel treatment, the husband appears, and it is found, by findings binding upon the Court of Appeals, that the wife had changed her domicile from that of her husband to this State, by reason of his cruel treatment, and that the alleged cruelty had been committed, the wife's action, on appeal from an affirmance of a judgment in her favor, is not to be deemed barred by a judgment of absolute divorce obtained by the husband in the State of his domicile, in an action brought by him subsequent to the wife's change of domicile, in which she was only constructively served as an absent resident and did not appear; but such judgment of the other State, having been rendered without acquiring jurisdiction of the person of the wife, is void as to her, and without effect in this State.

3. Judgment of Another State—United States Constitution. The provision of the Constitution of the United States (Article IV, Section 1) requiring each State to give full faith and credit to the judicial proceedings of every other State, has no application to a judgment for divorce shown to have been rendered without acquiring jurisdiction of the person.

4. Agreement Between Separated Husband and Wife as to Alimony and Custody of Child. An agreement, entered into by a wife, her trustee, and the husband, after reciting that the principals had ceased to live together as man and wife, and that the agreement was not to prevent "any consequences which may follow, or right which may arise to either party, if such status shall continue," provided for the custody and maintenance of their child, and for alimony to the wife, and stated that the divorce of either party should terminate the agreement. Held, that the agreement was mutually terminated, under its terms, by the recovery of a judgment of absolute divorce by the husband in the State of his domicile, and by an action for limited divorce brought by the wife in this State, where she had acquired a separate domicile, with the effect of leaving the trial court of this State free to act as it deemed proper respecting the alimony of the wife and the custody and maintenance of the child.

Atherton v. Atherton, 82 Hun, 179, affirmed. (Argued January 21, 1898; decided March 1, 1898.)

Appeal from a judgment of the late General Term of the Supreme Court in the fourth judicial department, entered January 14, 1895, affirming a judgment in favor of plaintiff, granting her a limited divorce, entered upon a decision of the court on trial at Special Term.

The facts, so far as material, are stated in the opinon.

Alex. P. Humphrey and Simon W. Rosendale for appellant. The Kentucky judgment is a bar to this action. (U. S. Const. Art. 4, Sec. 1; U. S. R. S. Sec. 905; Pennoyer v. Neff, 95 U. S. 914; Arndt v. Griggs, 134 U. S. 316; Lynch v. Murphy, 161 U. S. 247; Nelson on Divorce, Sec. 28; 2 Kent's Com. 460;

Scudder v. U. Nat. Bank, 91 U. S. 406; L. & G. W. S. Co. v. P. Ins. Co., 129 U. S. 397; Pritchard v. Norton, 106 U. S. 124; Rigney v. Rigney, 127 N. Y. 408; Laing v. Rigney, 160 U. S. 531; Ditson v. Ditson, 4 R. I. 87; 10 Abb. (N. C.) 333; Maynard v. Hill, 125 U. S. 190; Kinnier v. Kinnier, 45 N. Y. 535.) There was no evidence to support the finding that the plaintiff, Mrs. Atherton, was a resident of the State of New York. (Queen v. Jackson, L. R. 1 Q. B. 671; Code Civ. Pro., Sec. 1763; de Meli v. de Meli, 120 N. Y. 485; Dupuy v. Wurtz, 53 N. Y. 556; Hart v. Kip, 148 N. Y. 306; Story's Conflict of Laws, Sec. 744; Whart. Conflict of Laws, Sec. 490; Warrender v. Warrender, 2 Cl. & F. 488; Dolphin v. Robbins, 7 H. L. C. 390.) There is error of law in the decree as to alimony for plaintiff and in its provisions for the support of the child. (Carpenter v. Osborn, 102 N. Y. 552; Clark v. Fosdick, 118 N. Y. 7; Galusha v. Galusha, 116 N. Y. 635; 138 N. Y. 272; Duryea v. Bliven, 122 N. Y. 567; People v. Sternberger, 153 N. Y. 684; Allan v. Affleck, 64 How. Pr. 380.)

William Kernan and A. M. Mills for respondent. It is sufficient to authorize the interposition of the court to grant a separation that there be ill-treatment and personal injury, or a reasonable apprehension of personal injury. (Whispell v. Whispell, 4 Barb. 217; Davies v. Davies, 55 Barb. 130; Byhin v. Byhin, 17 Abb. Pr. 20; Uhlmann v. Uhlmann, 17 Abb. (N. C.) 236; Lutz v. Lutz, 31 N. Y. S. R. 718; Straus v. Straus, 67 Hun, 491; Waltermire v. Waltermire, 110 N. Y. 183; de Meli v. de Meli, 5 Civ. Pro. Rep. 306; Evans v. Evans, 1 Hagg. Const. 35; Mason v. Mason, 1 Edw. Ch. 278.) The decree of divorce in Kentucky in favor of the defendant is no bar to this action. (Beckwith v. Beckwith, 24 Wkly. Dig. 5; Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30; People v. Baker, 76 N. Y. 78; O'Dea v. O'Dea, 101 N. Y. 23; Jones v. Jones, 108 N. Y. 415; Cross v. Cross, 22 Wkly. Dig. 309; 108 N. Y. 628; de Meli v. de Meli, 120 N. Y. 485; Rigney v. Rigney, 127 N. Y. 408; Williams v. Williams, 130 N. Y. 193;

Matter of De Garamo, 86 Hun, 390; People v. Karlsioe, 1 App. Div. 571; Bell v. Bell, 4 App. Div. 527.) Upon the findings of fact by the court the plaintiff had the legal right to change her residence and domicile from the State of Kentucky to the State of New York as she did, and was and is entitled to the decree granted to her. (2 Bishop on Mar. and Div. Sec. 125; Cheever v. Wilson, 9 Wall. 108; Hunt v. Hunt, 72 N. Y. 217; Rundell v. Van Inwegan, 9 Civ. Pro. Rep. 328; Mellen v. Mellen, 10 Abb. (N. C.) 329; Dupuy v. Wurtz, 53 N. Y. 556; Prentiss v. Butler, 37 N. Y. S. R. 605; Bassett v. Wheeler, 84 N. Y. 466; de Meli v. de Meli, 120 N. Y. 486; Phelps v. N. Y., N. H. & H. R. R. Co., 17 App. Div. 392.) There is no error of law in the decree as to the custody of the child. (People ex rel. v. Mercein, 3 Hill, 400; People ex rel. v. Mercein, 8 Paige, 47; Mercein v. People ex rel., 25 Wend. 64; Matter of Hartman, 23 Wkly. Dig. 128; People ex rel. Brush v. Brown, 35 Hun, 324; Allen v. Affleck, 64 How. Pr. 580; Code Civ. Pro., Sec. 1766; Matter of Waldron, 13 Johns, 418; Matter of Maurer, 18 Wkly. Dig. 568; People ex rel. v. Olmstead, 27 Barb. 9.) There is no error of law in the decree as to the allowance for the support of the child or a to the alimony for the plaintiff. (1 Bishop on Mar. and Div., Sec. 1302; Cropsey v. McKinney, 30 Barb. 48; Griffin v. Banks, 37 N. Y. 621; Galusha v. Galusha, 116 N. Y. 635; Code Civ. Pro., Sec. 1337.)

Bartlett, J. The defendant seeks on this appeal the reversal of a judgment for limited divorce recovered against him by his wife.

The judgment rests upon the finding of the trial court that the defendant had treated the plaintiff in such a cruel and inhuman manner that it rendered it unsafe and improper for her to cohabit with him, and justified her in seeking a separate residence; it gives her alimony and the custody of the only child of the marriage.

The plaintiff, a young lady of refinement and excellent social position, was married, when twenty-two years old, to the defend-

ant at her father's house in Clinton, New York, on the 17th day of October, 1888. The defendant is a young man of good family, a native of Kentucky, and at the time of his marriage resided with his parents at the city of Louisville. After the wedding trip the plaintiff and defendant took up their residence at the house of defendant's parents. On the 8th of January, 1890, a daughter was born, and is the only issue of the marriage.

On the 3d of October, 1891, the plaintiff left her husband's house permanently, taking the child with her. On the 10th day of October, 1891, and before her departure for the State of New York, the plaintiff, her trustee, and the defendant, with the advice of counsel, entered into a certain agreement that will be referred to later. Immediately thereafter the plaintiff departed from the Commonwealth of Kentucky, and came to the State of New York with the intention, as the trial court finds, of changing her residence and domicile from Kentucky to New York.

In the month of December, 1892, the defendant commenced an action against plaintiff in Kentucky for an absolute divorce, alleging that she had abandoned him in the month of October, 1891, without fault on his part, and such abandonment had continued uninterruptedly for the period of more than one year.

Under the statutes of Kentucky the proof of this state of facts entitles a plaintiff to a decree dissolving the bonds of matrimony. The defendant was not served with process in Kentucky, nor did she appear in the action.

The decree of divorce was obtained upon the assumption that the defendant was a resident of Kentucky who had been absent therefrom for four months, and could, therefore, receive notice of commencement and pendency of the action by a designated constructive process.

The plaintiff made his formal proofs, and in the absence of the defendant the Kentucky decree was entered about March 14, 1893.

The wife began the present action for a limited divorce on the ground of cruel and inhuman treatment in January, 1893, and the trial court rendered judgment in her favor in June, 1893.

The husband appeared in this case, was represented by able Kentucky and New York counsel, and the issues were thoroughly tried.

The principal question presented by this appeal is whether the Kentucky decree is a bar to this action, the defendant having set it up in his answer. The plaintiff attacked this decree on the ground that it was entered by a court having no jurisdiction of her person, she being at the time the Kentucky action was begun and the decree therein entered a resident of the State of New York.

On the other hand, the defendant insisted that his wife was at the time referred to a resident of Kentucky, and consequently bound by the decree. This was one of the issues tried and decided in favor of the wife.

The learned counsel for the defendant from Kentucky argued with great earnestness and ability that the matrimonial domicile of the wife is that of her husband, and consequently we are compelled by the Constitution of the United States to give full faith and credit to the decree in her husband's favor. (Art. 4, Sec. 1.) In view of the fact that we have a finding fixing the wife's domicile in this State, we are of opinion the Kentucky decree is void as to her under the law, as well settled in this jurisdiction.

It is undoubtedly true that the matrimonial domicile of the wife is that of her husband, but this general rule has its exceptions.

In this case we have the finding that the plaintiff was justified in leaving her husband, and that her sole reason for so doing was his cruel and inhuman treatment.

This court said, in Hunt v. Hunt (72 N. Y. 217), in speaking of the general rule as to the wife's domicile (at page 242):

> "There are, however, exceptions to the rule, one of which is invoked by the plaintiff in this suit, so that in certain cases a married woman may have a domicile in another jurisdiction than that of her husband. This is so when they are living apart under a judicial decree of separation, or when the conduct of the husband has been such

as to entitle the wife to an absolute or limited divorce. She may acquire a separate domicile whenever it is necessary for her to do so. But the right to do so springs from the necessity for its exercise."

In the case at bar we have the undoubted right of the plaintiff to change her domicile under this rule, followed up by the finding that she did so change it to the State of New York. It has been held in many cases that the jurisdiction of the court of another State in which judgment has been rendered is always open to inquiry in the courts of this State; and if that court has exceeded its jurisdiction, or has not obtained jurisdiction of the parties, the proceedings are void. (Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30; Hunt v. Hunt, 72 N. Y. 217; People v. Baker, 76 N. Y. 78; O'Dea v. O'Dea, 101 N. Y. 23; Jones v. Jones, 108 N. Y. 415; de Meli v. de Meli, 120 N. Y. 485; Rigney v. Rigney, 127 N. Y. 408; Williams v. Williams, 130 N. Y. 193.)

We have carefully examined the evidence, and have reached the conclusion that the findings of the trial court as to the issues of domicile of the plaintiff and the cruel and inhuman treatment by defendant of his wife are not without evidence to support them, and because of their affirmance by the General Term they are binding upon this court.

It therefore follows upon the facts and the law that the Kentucky judgment is not a bar to this action.

It remains for us to consider the appellant's points based on the alleged effect of the agreement entered into by the plaintiff, her trustee, and the defendant just prior to plaintiff's final departure from Kentucky.

This agreement bears date October 10, 1891. We do not regard this instrument as technically articles of separation between husband and wife, but rather an agreement to provide for the best interests of the child, made in contemplation of the fact that the parents had separated and were to live in different jurisdictions.

The opening recitation of the agreement refers to the parties as "having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of one or the other which has led to the existing state of affairs, or preventing any consequences which may follow, or right which may arise to either party if such status shall continue." This language makes it clear that, while the separation was recognized as a fact, the agreement was not to prejudice or affect existing rights of either party growing out of that situation.

The recitation clause further states that the parties desire to provide for the best interests of the child, and with this view they have entered into the agreement. It provides for the alternating custody of the child by her mother and the mother of the defendant; the defendant obligates himself to pay $500 for maintenance of the child during that portion of the year in which she is with her mother; the wife is to receive alimony at the rate of $125 a month, the divorce or second marriage of either party to terminate the agreement; the agreement was to continue as to the child until she was fourteen years of age, and as to her mother until January 8, 1904; if divorce was granted, the provisions as to plaintiff were to be carried into the decree.

There are other details not necessary to mention. We are of opinion that the suit for absolute divorce brought by the husband in Kentucky in December, 1892, and the action for limited divorce instituted by the wife in this State in January, 1893, both having proceeded to judgment, may be regarded as a mutual abandonment and termination of the agreement under its terms, and left the court below free to act as it deemed proper respecting the alimony of the wife and the custody and maintenance of the child. The provision of the agreement for the wife's alimony was not carried into the Kentucky decree, but the judgment in this action provides for the same amount of alimony per month of $125.

It is unnecessary for us to consider any of the questions which are argued in the briefs, resting on the assumption that the agreement was in full force and effect at the time the judgment was entered herein at Trial Term. The husband and wife had sought relief in the courts, and the interests of the child were safe, with the Supreme Court of this State guarding her rights.

The judgment of the General Term should be affirmed, with costs.

All concur except Gray, J., absent, and Martin, J., not sitting.

Judgment affirmed.

Law and Procedure in Divorce Suits in Kentucky.

The defendant, by way of further answer to the complaint herein, says that at and during the time of the matters complained of herein, and of the legal proceedings set forth herein, the following were provisions of the law of the State of Kentucky, in full force and effect in that State, to wit:

"Courts having general equity jurisdiction may grant a divorce for any of the following causes, to both husband and wife, to the party not in fault: Abandonment by one party of the other for one year."

"No petition for divorce shall be taken for confessed or be sustained by the admissions of the defendant alone, but must be supported by other proof."

"Action for divorce must be brought in the county where the wife usually resides, if she has an actual residence in the State; if not, then in the county of the husband's residence; and no such action shall be brought by any one who has not been a continuous resident of this State for a year next before its institution."

"An action for divorce must be brought within five years next after the doing of the act complained of."

These are, and were at the time of all the proceedings herein set forth, the provisions of the General Statutes of the State of Kentucky. All the said General Statutes were adopted

by the Legislature of the State of Kentucky, and approved by the governor thereof, and by their terms were made to and did take effect December 31, 1873, and have continued in force ever since.

The defendant further says that the following were also provisions of the law of the State of Kentucky at and during the time of the acts complained of herein, and the legal proceedings set forth herein, to wit:

"In actions between husband and wife she may sue or be sued alone."

"That plaintiff, to obtain a divorce, must allege and prove, in addition to a legal cause of divorce, a residence in this State for one year next before the commencement of the action; that the cause of divorce occurred or existed in this State; or, if out of the State, either that it was a legal cause of divorce in the State where it occurred, or existed, or that the plaintiff's residence was then in this State; that the cause of divorce occurred, or existed, within five years next before the commencement of this action."

"An action for alimony or divorce shall be in equity."

"An action for alimony or divorce must be brought in the county where the wife usually resides, if she have an actual residence in this State; if not, in the county of the husband's residence."

"Sec. 57. When constructive service allowed—how made. If defendant be: 1. A corporation having no agent in this State, known to the plaintiff, upon whom a summons can be lawfully served; or,

"2. A non-resident of this State, and believed to be absent therefrom; or,

"3. Have departed therefrom with intent to delay or defraud his creditors; or,

"4. Have been absent therefrom four months; or,

"5. Have left the county of his residence to avoid the service of a summons; or,

"6. To conceal himself that a summons can not be served upon him; or,

"7. If his name and place of residence be unknown to the plaintiff;

"The clerk shall, subject to the provisions of Section 58, make upon the petition an order warning the defendant to defend the action on the first day of the next term of the court which does not commence within sixty days after the making of the order."

"Sec. 28. When warning order can be made—affidavit.

"The clerk shall not make such warning order upon any of the grounds mentioned in sub-sections 1, 2, 3, 4, and 7 of Section 57, except upon an affidavit of the plaintiff; or of his agent or attorney, if he be absent from the county; or of his guardian, curator, committee, or next friend if he be under disability; or of the attorney of either of them, if absent from the county, stating the ground of the application for such order.

"2. Nor shall the clerk make such order on any of the grounds mentioned in sub-sections 1, 2, and 4 of Section 57 unless the affidavit also states in what country the defendant, or, if the defendant be a corporation, in what country its chief officer or agent resides or may be found, and the name of the place wherein a post-office is kept nearest to the place where the defendant or its chief officer or agent resides, or may be found; or unless the affidavit state the affiant's ignorance of such of those facts as he does not know.

"3. Nor shall the clerk make any such order upon any affidavit of an agent or attorney of the plaintiff, stating any of the grounds mentioned in sub-sections 1, 2, 4, and 7 of Section 57, unless the affidavit state the affiant's belief that the plaintiff is ignorant of such of the facts as are unknown to the affiant.

"4. The clerk may make such order upon an affidavit of the plaintiff, or of his agent or attorney, if he be absent from the county; or of his guardian, curator, committee, or next friend, if he be under disability; or upon the return of a summons by the proper officer, stating either of the grounds mentioned in sub-sections 5 and 6 of Section 57.

"5. But the clerk shall not make such order upon the affidavit of an agent or attorney unless it also state the affiant's connection with the plaintiff, and the fact that he is absent from the county.

"6. An affidavit made pursuant to the foregoing provisions of this Section, unless it be controverted by the defendant's affidavit, shall be sufficient evidence of the facts therein stated for the support of the action as well as of the warning order."

"Sec. 59. Appointment of attorney—his powers—duty—compensation. The clerk, at the time of making such warning order, shall appoint, as attorney for the defendant, a regular practicing attorney of the court, but the court may, and, for any reason which it deems good, shall appoint another attorney as a substitute for the attorney appointed by the clerk. Neither the plaintiff nor his attorney shall be appointed or be permitted to suggest the name of the defendant's attorney.

"2. Such attorney must make diligent efforts to inform the defendant by mail concerning the pendency and nature of the action against him, and must report to the court during the first term, which does not commence within sixty days after his appointment, the result of his efforts.

"3. The duties and powers of such attorney are governed by the last foregoing paragraph, unless he be employed by the defendant, or unless he be unable to inform the defendant concerning the action, or unless he learn that the defendant is under disability other than coverture, or other than infancy and coverture combined.

"4. Such attorney, if employed by the defendant, shall so report to the court, and such report shall be treated as an appearance of the defendant in the action.

"5. If such attorney can not inform the defendant concerning the action, or if he learn that the defendant is under disability other than coverture, or other than infancy and coverture combined, he shall so report to the court, and shall make an affirmative defense if he can; or if he can not make such

defense, he shall so report to the court, and shall be subject, with reference to such report, to the provisions of sub-section 3 of Section 36; and no act of his shall be treated as an appearance of such defendant.

"6. The provisions of sub-section 4 of Section 38 apply with reference to the compensation of such attorneys.

"7. No judgment shall be rendered against such defendant if under any disability other than coverture, or infancy and coverture combined, until a defense or report shall have been filed pursuant to sub-section 5 of this Section."

"Section 60. When defendant deemed constructively summoned. A defendant against whom a warning order is made and for whom an attorney has been appointed shall be deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly."

"Section 36, sub-section 3. No judgment shall be rendered against an infant—other than a feme covert—nor against a person of unsound mind, who is summoned in this State, until the regular guardian, or committee, or guardian *ad litem*, of such defendant shall have made defense or have filed a report, stating that after a careful examination of the case he is unable to make a defense. His report, that he can not make a defense, must be filed on or before the day for making defense, unless, for cause shown, the court extend the time; and failure to file such report, as required hereby, or by the court, shall be punished as a contempt."

"Section 38, sub-section 4. The court shall allow to the guardian *ad litem* a reasonable fee for his services, to be paid by the plaintiff and taxed in the costs. The affidavit of such guardian, or of another person, or other competent evidence, is admissible to prove the services rendered, but not to prove their value. The court must decide concerning such value, without reference to the opinions of parties or other witnesses."

"In construing the provisions of this code these rules shall prevail unless a different intention be expressed or be shown by the context. Each gender includes every gender."

The above provisions are, and were at the times set forth herein, contained in an act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to regulate practice in civil causes," which was duly passed by the Legislature of Kentucky, approved by the Governor thereof, and by its terms took effect on the 1st day of January, 1877, and has, except as amended, been in force ever since, and no amendments have in any way altered the provisions above referred to.

Under divers acts of the General Assembly of the Commonwealth of Kentucky and amendments thereto, there had been, before the time of any acts complained of, established a court of general superior equity jurisdiction, entitled "The Louisville Law and Equity Court;" and under the said law the said court was held in the County of Jefferson, State of Kentucky, and had general superior equity jurisdiction of all causes brought in said county; and, among others, actions for divorce. By the terms and effect of the law creating said court, it was to have no stated terms, but to be always open for the transaction of business; and, further, by the provisions of law applicable to said court, orders of warning against absent and non-resident defendants were required to be so entered by the clerk that the said defendant should be warned to appear and answer within sixty days after the entry of such order; and was to be deemed and was constructively summoned thirty days after the entry of such order of warning.